Supreme Court, U. S.
FILED
DEC 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-8001

AMERICAN MARITIME ASSOCIATION,

Petitioner,

v.

PETER G. PETERSON,
Secretary of Commerce, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 4, 1975

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PETER G. PETERSON,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled matter on September 5, 1975.

I

REFERENCE TO OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia appears at ____ U.S. App. D.C. ____, 518 F.2d 1070. The decision of the United States District Court is unreported. Both opinions are attached in the appendix, respectively at App. A-1 and A-29. The final opinion and order of the Maritime Subsidy Board is reported in 13 SRR 44 (MSB 1972), and is attached at App. A-33.

II

JURISDICTION

The decision below was entered September 5, 1975. Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(b). The case involves an important question of federal law which has not been, but should be, settled by the Supreme Court.

III

QUESTIONS FOR REVIEW

1. Whether, where the Merchant Marine Act, 1936 forbids payment of operating subsidy except when required to meet foreign-flag competition, and the Maritime Subsidy Board has held that it must reduce

such payment in proportion to the revenues earned from trade in which the act and other cargo-preference acts forbid foreign-flag vessels to participate, the Board is authorized –

a. to pay full subsidy under the statute if not more than one-half the annual gross revenues are earned from trade in which it is illegal for foreign-flag lines to participate; and

b. to treat as subject to foreign-flag competition a large class of cargo that foreign-flag vessels may not lawfully carry but the freight rates for which are the same that foreign vessels would charge, if they were eligible to carry it, under rate-fixing agreements between them and the American members of international shipping cartels –

where the cumulative effect of these exemptions vitiates the rule purporting to reduce subsidy and allows full payment even when subsidized lines carry annually 95% preference cargo.

2. Whether the Board correctly interpreted the statute as not requiring construction subsidy to be repaid in proportion to revenues from trade protected by law from foreign-flag competition.

IV

STATUTES

(a) Merchant Marine Act, 1936, as amended, 49 Stat. §§1985 ff., 46 U.S.C. §§1101 ff., particularly §501(a), 46 U.S.C. §1151, App. A-84, authorizing the payment by the United States under certain conditions

of construction-differential subsidy for construction of American merchant ships; §§ 601, 602, and 603, 46 U.S.C. §§ 1171, 1172 and 1173, App. A-88, 89, 90, authorizing payment under certain conditions of operating-differential subsidy for the operation of such ships; and § 901(b), 46 U.S.C. § 1241(b), App. A-94, granting preference to vessels of American registry in the carriage of cargo paid for or financed by the United States.

(b) The Act of April 28, 1904, 33 Stat. 518, 10 U.S.C. § 2631 (1964), App. A-98, granting preference to vessels of American registry with respect to military cargo.

(c) P. Res. 17, 73 Cong., 48 Stat. 500 (1934), 15 U.S.C. § 616a, App. A-98, granting preference to vessels of American registry with respect to cargo financed by the Export-Import Bank of the United States.

(d) Administrative Procedure Act, 5 U.S.C. §§ 551 ff. [hereafter APA], particularly § 7, 5 U.S.C. 556(d), (e), requiring rules and orders to be based on the record and supported by and in accordance with the reliable, probative and substantial evidence, and particularly § 8, 5 U.S.C. § 557, requiring rulings of administrative agencies to show the ruling on each controverted issue, and to state findings and conclusions, with reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; § 10(e), 5 U.S.C. § 706, requiring the reviewing court to compel agency action unlawfully withheld, and to hold unlawful and to set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, short of statutory right, unsupported by substantial evidence, or without observance of procedure required by law.

V

STATEMENT OF THE CASE

The Merchant Marine Act, 1936 provides for the payment of construction and operating subsidies for the purpose, so far as here relevant, of meeting the competition of foreign-flag vessels in foreign trade, titles V, VI, 49 Stat. 1995, 2001, 46 U.S.C. §§ 1151 ff., 1171 ff. However, under another provision of the act and other similar statutes, cargo shipped or financed by the United States government may be carried only by vessels of American registry. These cargo-preference laws are § 901(b), Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1241(b); the act of April 28, 1904, 33 Stat. 518, 10 U.S.C. § 2631 (1964 codification); P.Res. 17, 73 Cong., 48 Stat. 500 (1934), 15 U.S.C. § 616a. The first reserves 50% of cargo generated by the nation's various programs of foreign aid; the others reserve effectively 100% respectively of military cargo and cargo financed by the Export-Import Bank of the United States.

Cargo from these sources had come to dominate the services of the lines subsidized under titles V, VI since at least 1964, as the Chief Examiner of the Maritime Subsidy Board found. In the last year covered by the record, the largest subsidized line devoted over 94% of its outbound space to preference cargo in its major Gulf-Orient services, and three large West Coast operators over 80%. In the great trade routes to Europe, the Mediterranean and the Far East over 70% of the total revenue tons all subsidized lines carried in the four years of record as a whole derived from the preference statutes.

As the volume of preference cargo declined, especially military cargo to Vietnam, acute competition developed between the subsidized lines and unsubsidized carriers, in the course of which the former, cushioned by their subsidies, admittedly commenced in 1969 to bid below costs before subsidy.

On July 1, 1969, plaintiff petitioned defendants under their established procedures, 46 C.F.R. § 201, to institute proceedings for promulgating rules to limit subsidy payments for the carriage of preference cargo. Plaintiff proposed three rules, which are set out in the Maritime Subsidy Board's Notice of Hearing, 34 F.R. 19149, App. A-71. In general, these rules proposed that operating subsidy should be reduced, and construction subsidy repaid to the government, in proportion to the ratio of net preference revenue to total net revenue earned. MSB granted the petition on December 1, 1969, and instituted Docket S-244, a fact-finding hearing relative to the proposed rules.

Following extensive hearings, the agency's Chief Examiner served findings June 22, 1971, substantially sustaining plaintiff's contentions. He found that "operating differential subsidy is properly payable only for the carriage of commercial cargo" (and for a certain class of preference cargo he thought "difficult to identify as government-impelled prior to shipment"). He did not pass on the question of construction subsidy. He found that subsidized companies were concentrating on preference cargo to the neglect of commercial service. Finally, he found the existence of unfair competition that was threatening the unsubsidized fleet with imminent extinction. He recommended adoption of plaintiff's proposed rules relating to operating subsidy.

The Board rendered its own final opinion and order June 12, 1972, in which it rejected (without discussing) the Chief Examiner's report, and declined to adopt plaintiff's proposed rules. However, it held that operating subsidy is intended to place American operators in a position to compete with foreign operators, and that subsidized operations must be conducted in such a manner as not to preclude such competition; and that "payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience." App. A-42. The Board ordered a reduction of subsidy in proportion to the extent that "at least 50% of the gross freight revenues earned for that service are [not] earned from the carriage of commercial cargoes, conference-rated civilian preference cargoes or open-rated civilian preference cargoes carried at 'world' rates". App. A-54.

Pursuant to 28 U.S.C. §§ 1331, 1333, 1337 and 5 U.S.C. §§ 701-706, plaintiff appealed to the United States District Court for the District of Columbia, setting forth as grounds of error among other matters (1) the 50%-exemption from the requirement of foreign commercial competition, and the further exemption of preference cargoes also insulated from foreign-flag competition but the freight rates of which are subject to tariffs agreed by American carriers with international freight cartels, the effect of these exemptions being to render the pretense of subsidy reduction entirely illusory; and (2) the failure of the Board to extend the principle of subsidy reduction to construction subsidy.

The subsidized intervenors did not appeal "because of our uncertainty as to the actual extent to which the regulations will injure AIMS members." 518 F.2d at 1076 note 9, App. A-10.

The District Court, Robinson, J., going beyond the contention of any party, held that the statute does not permit any reduction of operating subsidy on account of the carriage of preference cargo. App. A-29. He therefore did not reach the other grounds of plaintiff's appeal. App. A-31 note 3.

The United States Court of Appeals for the District of Columbia circuit over-ruled the conclusion of the District Court that operating subsidy may not as a matter of law be reduced for carriage of preference cargo, holding that such reduction is proper because "The Act consistently speaks of awarding subsidies only to vessels 'meeting foreign competition' ", 518 F.2d at 1082, App. A-24, and remanded with instructions to reinstate the Board's order: "The Board's rule reducing subsidy when a vessel is not in 'substantial competition' appears to strike a sound balance between the intention of Congress and the competitive needs of the industry." Id. Plaintiff's grounds of appeal against the Board's order respecting operating subsidy were not specifically discussed in the Court's opinion, although inferentially rejected.

With respect to construction subsidy, the Court of Appeals likewise sustained the Board's refusal to require a rebate for the carriage of preference cargo, holding that the requirement of meeting foreign competition does not apply under title V as amended in 1952 and 1970. App. A-26.

VI

ARGUMENT

The questions presented are important to the proper administration of the Merchant Marine Act, 1936, upon

whose subsidy provisions, especially in relation to other sections granting cargo preference to American vessels, the Supreme Court has never pronounced. They are important to national policy governing defense and commerce by sea and crucial to shipping companies affected by the act.

The American merchant marine is a significant component of the national defense, as well as of national policy affecting foreign commerce, § 101 MMA'36, 46 U.S.C. § 1101. Upon the correct construction of the act hinges the economic fate of the major unsubsidized sector of the American merchant marine, which has represented the surge capacity of the nation at war or in emergency, and the disappearance of a large sector of which has recently been described by the Department of Defense as being of "the greatest concern".[1]

Petitioner's membership is broadly representative of the unsubsidized American fleet. On January 1, 1969,

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[1] Testimony of Deputy Assistant Secretary John J. Bennett before the House Committee on Merchant Marine and Fisheries, June 5, 1975:
"The changes in the general cargo fleet are giving us the greatest concern . . . I need to emphasize that we are concerned for the type and number of American vessels which could quickly be made available in a minor contingency situation where Allied support is absent and ship requisitioning is not possible. We are equally concerned that the total general cargo assets available to Defense for a major deployment effort, including specific NATO shipping allocations in the case of a NATO effort, are only marginally adequate to meet our needs. During the Korean and Vietnam situation, there were U.S.–flag tramp general cargo vessels available, as well as a large National Defense Reserve Fleet. Today the tramp ships are all but vanished." [Not yet printed.]

63 of its members operated 195 dry-cargo liner and tramp ships totalling over 2.5 million deadweight tons. On January 1, 1975, these had diminished to 18 companies operating 95 such ships of 1.5 million tons. Of the two remaining liner operators, one had been obliged to apply for subsidy. Thus, in the six years of the present proceeding 100 ships, a million tons of shipping, have disappeared. In the whole foreign-trade fleet only three major unsubsidized liner operators remain, of which one has also recently applied for subsidy. Virtually all break-bulk tramps have been forced out of business.

All of this has come about chiefly because of the employment of the differential subsidies, intended to meet foreign-flag competition, instead as a fighting tool against American operators not receiving them in the struggle for cargo reserved by law from foreign-flag lines.

It follows the forecast of the Chief Examiner, and indeed of the agency itself in contemporaneous forums outside its own proceedings herein.[2]

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[2] Appearing before the Federal Maritime Commission in a proceeding respecting compensatory rates for military cargo, the agency said that according to a then recent study, "military cargo rates had fallen to levels which were clearly noncompensatory on the basis of fully allocated cost and concluded further that maintenance of rates at these levels would work to the detriment of the U.S. merchant marine." 76 Congressional Information Bureau p.2 (September 12, 1972). "If these rates are allowed to remain below full costs, this instrument for gradual modernization is converted into a tool that U.S. carriers are forced to use against themselves. DOD cargo, which might have been the impetus for fostering international competition, becomes the means for destructive internal competition. This destructive competition thwarts the very intent of the national

A. THE RULE CONCERNING OPERATING SUBSIDY.

The differential-subsidy structure of the act pivots on the presence or absence of foreign-flag competition. On the one hand, it expressly forbids payment except to meet such competition. §§ 601(a), 602 MMA'36, 46 U.S.C. §§ 1171, 1172. On the other hand, the act forbids foreign-flag competition for foreign-aid cargo (furnished or financed by the United States) by reserving a fixed percentage of such cargo for American ships.[3] Read together, as statutes must be, the only natural, unforced meaning of these provisions is that subsidy may not be paid for carrying preference cargo. To pay subsidy where there is no foreign competition violates the literal prohibition against paying where there is no foreign competition.

Reinforcing this natural construction is another evidence that the act creates two separate systems of maritime assistance. The measure of the subsidy is in effect the difference in construction and operating costs

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policy of strengthening the U.S. merchant marine by restricting certain government cargoes to U.S.–flag ships." Id. "The projections . . . indicate that the U.S. merchant fleet will be inadequate to meet emergency shipping requirements in the future. These projections, however, include the excess capacity which exists at present. It is thus apparent that any elimination of presently existing excess capacity will render the fleet less adequate for use in a future national emergency." Id.

[3] § 901, MMA'36, 46 U.S.C. § 1241, reserves not less than 50%. The other preference laws reserve 100%. 10 U.S.C. § 2631 (military cargo); 15 U.S.C. § 616a (cargo financed by the Export-Import Bank).

between competing foreign and American vessels; this cost-differential subsidy is designed to equalize the disadvantages of higher-cost American operation, and theoretically to permit freight-rate competition at world levels. On the other hand, the preference statute not only excludes foreign competition, but expressly guarantees American vessels fair and reasonable freight rates compensatory at their American cost of operation. For the government to pay both the cost-differential subsidy and the compensatory freight rate is to pay, as all agree, a double subsidy. Congress cannot have intended to pay twice for the same service.

These principles were in general accepted both by the agency and the Court of Appeals. However, the former engrafted a qualification approved by the Court as signifying that vessels do not forfeit subsidy if they carry "some" preference cargo: "The Act consistently speaks of awarding subsidies only to vessels 'meeting foreign competition'. The legislative history, however, indicates that Congress had contemplated the payment of some 'double subsidies' to shippers carrying preference cargo." 518 F.2d at 1082, App. A-24.

But in giving content to the minimizing expression "some", the Board adopted a rule that exacts no reduction of subsidy from a subsidized line carrying 95% preference cargo in the last year of record (and averaging 90% for the whole period of record, 1964-1969.)[4]

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[4] On their important services the three largest subsidized lines carried the following amounts of export preference cargo in the last year of record, and none would have been subject to abatement under the agency's rule:

APL	AML	80%
Lykes	Far East	95%
	Mediterranean	86%
AEIL	Far East	82%
	Mediterranean	76%

The Board said that "payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience", but it proceeded first to exempt half the freights earned, and then to treat as subject to foreign competition an entire class of preference cargo that foreign operators are ineligible to carry.

Although the Court refers to the case as "a difficult and complex situation", 518 F.2d at 1083, App. A-28, judgment here does not turn on factual complexities hidden in the record, but upon errors apparent on the face of the Board's opinion to which the Court of Appeals did not explicitly direct its attention. These exemptions had the consequence not of effectuating a general statement of law otherwise perhaps unexceptionable, but of vitiating it, leaving conditions precisely where they had been before the whole protracted proceeding[5] – except that as the Court seems to recognize, at 1074 note 4, App. A-6, in the meantime a major part of the unsubsidized American merchant marine has been destroyed.

Statistics are not available for subsequent periods. The only published data are for military container cargo, and do not distinguish subsidized carriers. However, for 1970-1973, such cargo accounted for 65% of total outbound cargo of all American container carriers to the Far East and 28% to the Mediterranean.

[5] The subsidized lines did not even appeal the Board's order and sought no affirmative relief upon plaintiff's appeal.

1. The unexplained 50% exemption.

The Board ruled that "to the extent that less than a substantial portion of the gross freight revenues earned for a service are earned from carriage of cargo subject to foreign-flag competition", it would reduce operating subsidy "in proportion to the decreased gross freight revenues earned from such carriage"; but it defined "substantial portion . . . to mean 50%." App. A-43.

The opinion contained nothing more than this bare statement; the Board nowhere explains how it reached this result, which is absolutely crucial. Nothing in the record or in the statute or legislative history explains it. And it over-rules without discussing the opposite conclusion of its Chief Examiner, who recommended adopting petitioner's proposed rule of a reduction in subsidy proportioned to net revenue from non-competitive cargo. Cf. Maine v. CAB, 520 F.2d 1240, 1244-1245 (1st cir. 1975).

a. The mere omission to explain so vital a ruling violates the Administrative Procedure Act, 5 U.S.C. § 557(c), applicable in rule-making proceedings required to be decided on the record, as the Court of Appeals held this one was, 518 F.2d at 1082 and note 28, App. A-25. To give no explanation at all for a material action is itself the extreme instance of the arbitrary within the meaning of the Review Act, 5 U.S.C. § 706(ii)(A).

b. But the requirement of a reasoned explanation is the more compelling where the matter is so material that there pivots upon it whether the regulation is to be meaningful in carrying out an announced construction of law or is to be a mere dead letter from its inception. This is not a case either of de minimis non

curat praetor or of a fair division between contending interests: like the judgment of Solomon, this cut kills.

c. It is, moreover, inconsistent with the statutory goal, as interpreted by the agency, of providing a merchant marine adequate to carry 50% of our foreign trade. § 101,46 U.S.C. § 1101. If this were the only exemption it would still be necessary to subsidize a fleet twice as large as otherwise required for that purpose, while driving out unsubsidized carriers whose main function and subsistence was in the preference sphere.

d. Nor can it be reconciled with the absolute prohibition against even carrying preference cargo that the same agency has imposed on bulk carriers subsidized under the same provisions of law.[6] Even experienced shipping men cannot fathom this unexplained discrimination between the two classes.

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[6] "No cargoes are to be carried that are subject to the cargoes [sic] preference statutes including 10 U.S.C. 2631, 46 U.S.C. 1241 and 15 U.S.C. 616a." 38 F.R. 12246 (May 10, 1973). Compare also the so-called Russian wheat program, as to which the rule reads, 46 C.F.R. § 294.3(c)(6): "*Ineligible voyages.* No voyages shall be eligible for subsidy during which the subsidized bulk cargo vessel carries: *** (ii) U.S. preference cargo, including that covered by 10 U.S.C. 2631, 46 U.S.C. 1241 and 15 U.S.C. 616a . . .". This latter provision shows again the arbitrary nature of the agency's proceedings. The Court approved the Board's rule "that subsidies should be based upon the amount of competition cargo carried during the year . . . instead of . . . voyages." 518 F.2d at 1082, App. A-25. Yet here the Board refuses to subsidize any part of any voyage on which preference cargo is carried. This is actually more consistent with the act, cf. § 605(a), 46 U.S.C. § 1175(a).

2. The exemption of civilian preference general cargo.

In addition to the 50%-exemption, the Board created another broad exemption by treating as "subject to foreign-flag competition" cargo that foreign lines cannot legally carry but whose freight rates they are said to "directly influence or determine" through their membership in international freight conferences. This class of cargo, which the Board calls conference-rated, consists of non-military general cargo shipped or financed by the civilian agencies of the Government, and is therefore subject to § 901(b) or to P.Res. 17. During the period of record it represented in the major Far East trade about 25% of the total revenue tons carried as exports by the subsidized lines as a group, and 32% of their gross revenues.

The Board gives as an explanation for holding that this large class of cargo is subject to foreign-flag competition although foreign carriers are forbidden to carry it only that there is a "second category of competition . . . where only one carrier is eligible to carry the cargo but the rate at which he must carry it is directly influenced or determined by an ineligible carrier or carriers. . . . In the second case, the competition manifests itself in the effort of the eligible carrier to maintain a profitable operation while carrying cargo at rates influenced or determined by the ineligible carrier or carriers." App. A-44.

a. The Board agrees that there is here no competition in the ordinary business sense of physically procuring the cargo since the foreign carrier is ineligible to carry it. Yet competition for concrete cargo is the sense of the competition envisioned by the act.

Compare § 605(c), 46 U.S.C. § 1175(c); Senate Hearings on S. 3500, 74 Cong., 2d sess. p. 62.

b. But the supposedly competitive rates are made by the American carriers in concert with their foreign fellow members of the international carrier cartels. As the Board itself says: "Generally speaking, international commercial rate conferences are formal organizations of competing U.S.-flag and foreign-flag carriers established for the purpose of fixing rates." App. A-50. These are agreements to *eliminate* rate competition. It is not apparent how agreeing to eliminate rate competition can be regarded as being rate competition. Thus there can here be no "competition for cargo" that "manifests itself" in such competition. Since the preference statutes eliminate service competition for the cargo and the conferences eliminate rate competition, the Board's conclusion is without support.

c. The Board says that the kind of "competition for cargo" it has in mind "manifests itself in the effort of the eligible carrier to maintain a profitable operation while carrying cargo at rates influenced or determined by the ineligible carrier or carriers". App. A-44. This seems to imply that the alleged influence tends to depress rates for civilian preference general cargo below what would prevail in the absence of this "competition".

The Board makes no finding that this actually happened. The record is altogether to the contrary.

Conferences concert rates to fix them at a level higher than would prevail under competition. These are cartels inherently negatory of free competition, and legal only by express exemption from the anti-trust laws when approved by the Federal Maritime Commission. § 15, Shipping Act 1916, 46 U.S.C. § 814. The evidence of the subsidized lines was that "the

conference is certainly not trying to reduce rates unless there is a reason." Tr. 3063.

That conference rate-making for preference general cargo does not influence rate levels in a direction detrimental to American subsidized carriers is demonstrated by the fact that on average such carriers have earned their full American costs *before* subsidy in all the trades in which such cargo has moved in the years of record, including 17 distinct services.

B. THE RULING CONCERNING CONSTRUCTION SUBSIDY.

Rejection of plaintiff's contention that the statutory grant of construction subsidy also is conditioned upon meeting foreign competition likewise raises a crucial issue.

The shipping industry has for the first time become capital intensive even in the dry-cargo sector. The container-ship evolution, pioneered by unsubsidized American carriers concentrating on cargo protected from foreign competition under American law, followed later by vessel types featuring separable barges, introduced units and systems of multiplied productivity. However, capital costs have augmented in proportions only less extraordinary. In 1961 standard cargo ships cost about $11 million; in 1972, the average cost of new units ran about $34 million. For those who built with subsidy, the government absorbed about $5½ million in the former year, but $14 million in 1972; and it is understood that certain vessels are currently estimated at twice these last amounts for gross cost and government subsidy.

As with all capital intensive property, fixed costs of this new type of equipment are enormous. So great a discrepancy in fixed costs cannot but prove destructive to existing unsubsidized companies in competition for preference cargo, and must, if not offset at the point of collision over cargo protected against foreign competition, prevent future unsubsidized entry into American shipping.

The correct construction of title V of the Merchant Marine Act is therefore of critical importance to unsubsidized carriers challenged to meet rates for preference cargo brought below allocable costs before subsidy.

Here again no esoteric search of the record is required, since at all stages the agency treated this issue as a question of law.

The Court of Appeals recognized that "As originally enacted Title V prescribed criteria for awarding CDS similar to those for ODS, including the requirement that the vessel be used in a service which was meeting foreign competition." 518 F.2d at 1083, App. A-26.

However, the Court found significant the deletion of this foreign-competition clause in 1952, and a further amendment in 1970 allowing subsidies to be paid to shipyards as well as ship-owners.

Despite these changes, there is solid proof that the original limitation to meeting foreign competition continues in full force. On established principles of statutory construction, the intent of the law, gathered from its history, must be allowed to illuminate a seeming discrepancy, which if given literal effect would produce stultifying consequences. FTC v. Jantzen, 386 U.S. 228, 87 S.Ct. 998 (1967); Gerasco v. Walling, 324 U.S. 244, 65 S.Ct. 605 (1944), affirming Guiseppi v.

Walling, 144 F.2d 608 (2d cir. 1944); FTC v. Standard Motors Products, 371 F.2d 613 (2d cir. 1967); FMC v. DeSmedt, 366 F.2d 464 (2d cir. 1966), cert. denied 385 U.S. 974, 87 S.Ct. 513 (1966).

1. The 1952 amendment did not eliminate foreign-flag competition as the condition of construction subsidy.

Until 1952, § 501(a) read: "No such application shall be approved by the Commission unless it determines that (1) the *service, route or line requires a new vessel* of modern and economical design *to meet foreign-flag competition* and to promote the foreign commerce of the United States".

In 1952 this clause was amended to read: "No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, [and] will aid in the promotion and development of such commerce, etc.".

The extensive legislative history shows that Congress intended by the amendment to strengthen certain carriers expressly to *meet* foreign competition, not to eliminate the requirement of foreign competition which constitutes the whole conceptual base of the differential-subsidy system.

It did this by making tramps and certain liners (then ineligible because not tied to a "service, route, or line") eligible for construction subsidy through the mechanism of striking the trade-route clause from § 501(a). The articulated purpose of the amendment was to enable services of this kind "*to maintain competitive foreign services.* It is to our interest to retain those services if

possible, but because of the higher cost of American over foreign construction, it is apparent that the shipping companies not receiving the operating subsidy must be placed in the position to modernize and replace their fleets *if they are to continue to compete with the lower cost foreign company.*" S. Rep. 295 [To accompany S. 241], 82 Cong., 1st sess. p.9. To exactly the same effect, H. Rep. 1407 [To accompany H.R. 5346], 81 Cong., 1st sess. pp. 7-8; H. Rep. 2221, 82 Cong., 2d sess. pp. 6-7; see House Hearings pp. 17, 41; Senate Hearings on S. Res. 50 and S. 2786, 81 Cong., 2d sess. pp. 109-110, 146; 265, 1866, 1867, 1431, 1434. And again (responding to Administration comment): "This position is a clear-cut admission of fact that *construction aid to that shipping which meets foreign competition is essential* if we are to have a fleet adequate for our national defense and to serve our commerce. To this extent the Executive position conforms completely with the conclusions of your committee. . . . *our shipping cannot successfully compete against foreign operators without construction aid.* If we are to meet our national shipping needs, operators must be in a position to plan ahead." S. Rep. 295, Part 2 [To accompany S. 241]. 82 Cong., 1st sess. p. 5.[7]

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[7]The spokesman for the subsidized lines testified in supporting the bill, which had in fact apparently been drafted by his organization, that the standard of liner service on fixed trade routes was what the legislation aimed to relax, thereby extending construction subsidy to ship-owners "*as long as they meet foreign competition* and operate under the terms otherwise prescribed in the Act." Senate Hearings on S. Res. 50 and S. 2786, p. 110.

Amendments so precisely designed to enhance the power of American shipping companies to compete could not have the stultifying object of repealing the duty to compete at all. No word can be found in the legislative history to suggest any such intention or even discussing it, let alone to demonstrate that the words about meeting foreign competition were advertently dropped for the deliberate purpose of eliminating the requirement. Although the complete absence of discussion in the elaborate legislative history suggests a drafting inadvertence, there is a reasonable explanation, consistent with the evident purposes of the 1952 amendment, why in addition to "service, route or line", the expression "to meet foreign-flag competition" gave way to "meet the requirements of the *foreign* commerce of the United States".

It may have been thought that the change was needed in order to allow construction subsidy to meet foreign competition that was not directly parallel on a given route. The final form of §§ 501 and 601 as originally enacted in 1936 was a compromise between a version that would have granted construction and operating subsidies "to meet direct or indirect foreign-flag competition" (S. 3500, 74 Cong., 2d sess. §§ 501(a)(1), 521(1), Committee Print of March 3, 1936) and a version that would have denied all recognition to indirect competition as being "of a highly questionable character" and "remote and indefinite" (comments of Senator Guffey, Senate Hearings on S. 3500, 74 Cong., 2d sess. at 123, and see his bill S. 4110, §§ 23(a), 32(a)). In the compromise, indirect competition was entirely excluded as the basis for construction subsidy, and subjected to a high standard of proof with respect to operating subsidy by

the addition of § 602. Hearings on S. 3500, supra, at 62; and see § 602 as enacted, 46 U.S.C. § 1172. Under § 501 itself, construction subsidy was prohibited "unless . . . the service, route or line requires a new vessel . . . to meet foreign competition", an expression that, lacking a clause equivalent to § 602, clearly was limited to competition directly on the service, route or line.

Reading the clause as thus allowing subsidy only to meet competition directly *on* the service, route or line, Congress might have thought that the whole clause must be altered to admit indirect competition such as was likely to be usual in the more flexible services now rendered eligible although not tied to a particular "service, route or line".

This explains also why in 1970, amending § 601 to make the same class of carriers eligible for operating subsidy, Congress found it necessary to change only the "service, route or line" phrase, leaving the original competition clause intact, already modified as it was by § 602 in respect of indirect foreign competition. In neither case was there any intention to eliminate the substantive prerequisite to granting subsidy. ". . .[C]onstruction aid to that shipping which meets foreign competition is essential". S. Rep. 295, Part 2, supra, at 5.[8]

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[8]Compare Independent Bank v. FRS, 516 F.2d 1206, 1219 (D.C. Cir. 1975), for a closely analogous construction of an amendment that dropped a critical clause from a statute, where the complete absence of legislative discussion was deemed to show no substantive change was intended as to the subject covered by this clause. There, too, the real change Congress purposed made the law somewhat more flexible than the clause would literally have allowed, and the latter was therefore deleted without repealing its application.

That the new § 501 expression, "meet the requirements of the foreign commerce of the United States", incorporates this expanded conception of competition is plainly illustrated in the 1970 amendment to § 905(a), which is intelligible only as an extension of the same principle to cross-trading between foreign countries.

As amended in 1970 (and again in 1972, P.L. 92-402, 86 Stat. 617), this section defines "foreign commerce" as "commerce ... between the United States ... and a foreign country, except that *in the context of ... title V of this Act concerning construction-differential subsidy*, the said words 'foreign commerce' ... shall also include, in the case of liquid and dry-bulk cargo carrying services, trading between foreign ports in accordance with normal commercial bulk shipping practices in such manner as will permit U.S.-flag bulk vessels freely *to compete* with foreign-flag bulk carrying vessels in their operation or *in competing* for charters ...". This language really says that such carriers may *not* be subsidized for the additional range *except* in order to meet foreign competition. See Conference report, H. Rep. 91-1555 [To accompany H.R. 15424] p. 7.[9]

It makes explicit for these carriers what is necessarily implied for all carriers in the very nature of the differential-subsidy system, which is based on the theory that Americans are at a cost disadvantage in

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[9] "... such ships must move from area to area and sometimes from foreign to foreign destinations before returning to the United States in order to compete in the world trade." See the agency's G.O. 111, 46 C.F.R. Part 278, and the explanation for its adoption, Pike & Fischer, Shipping Regulation Current Service p. 230:351-352.

competing with foreign operators. The common sense of the matter is that in the absence of such competition, American operators would be able to pitch their freight rates to their costs, including capital costs. They would surely not in that case require subsidy, as the agency itself has said. American South African Line, Trade Route 14, 3 USMC 314, 321 (1947); A-20, War Area or Danger Zone Bonuses, 6 SRR 651 (MSB 1965); Manual of General Procedures, Pike & Fischer, Shipping Regulation Current Service p.186:191; A-37 AEIL–ODS Application, Trade Route 5-7-8-9, 11 SRR 193 (MSB 1969).

So a high capital investment is a disadvantage only if exposed to continuing collision with a lesser investment in competitive equipment of equivalent efficiency. That is the sense of the act.[10]

2. The agency interpreted the amended act to retain the foreign-competition requirement.

Demonstrating that the agency itself did not consider the 1952 amendment to have repealed the requirement for foreign competition, five years after this amendment it promulgated its Manual of Procedures-Construction-Differential Subsidy, SR Current Service, p. 210:102, dated 1957 but some years in preparation:

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[10]Note the comment of the House Committee on Merchant Marine and Fisheries in connection with P.L. 89-127 (1965), 79 Stat. 519, extending the then 55% construction subsidy in order to maintain parity with foreign competition: "*Without adequate Government contribution to the shipbuilding program to keep the American operator on a parity with his foreign competitor*, he will be unable to proceed expeditiously with his replacement requirements." H. Rep. 214, 89 Cong., 1st sess. (1965) p.2.

"Upon receipt . . . of an application for construction-differential subsidy, the Maritime Administration will: 1. Review the proposed ship commercially required . . . in terms of the following: . . . (c) Whether the ship will meet the requirements of the foreign commerce of the United States; will aid in the promotion of such commerce and *will meet foreign-flag competition* and the commercial requirements of the intended route, line and service". This rule is otherwise in the language of the 1952 amendment of § 501, so that its explicit competition clause is the agency's own more nearly contemporary gloss on the meaning of the amended act. So far as appears, this regulation is still in effect.

In other formal action, the agency has held payment of construction subsidy to be justified only to meet foreign competition. American President Lines – Mechanization of Ships, 3 SRR 757, 762 (MSB 1964); United States Lines – Reconstruction Subsidy, SS UNITED STATES, 2 SRR 865 (MSB 1963). In the one case subsidy to mechanize vessels was allowed for improving competitive power, in the other it was refused on the ground that the proposed improvement had only a conjectural tendency to improve competitive ability.

3. The Court's "shipyard-subsidy" theory is in error.

The Court below says, however, that another amendment in 1970, which made shipyards eligible to apply for construction subsidy, in effect converted that subsidy from a subsidy for ship-owners to one for shipyards. 518 F.2d at 1083, App. A-27. The 1952 amendment, critical here, made no such change. Not

merely did owners alone remain eligible for subsidy, but the committee reports stressed the pervasive philosophy of the act that the subsidy was designed to assist *operators* in competing with foreign services: ". . . our *shipping* cannot successfully compete against foreign *operators* without construction aid. If we are to meet our national shipping needs, *operators* must be in a position to plan ahead." S. Rep. 295, Part 2, 82 Cong., 1st sess. p. 5.[11]

The language that the Court's opinion cites in support of its shipyard-subsidy theory appears in H. Rep. 91-1073, 91 Cong., 2d sess. p. 30. However, this language was drawn from testimony of the Maritime Administrator in proposing an amendment that would have limited eligibility for construction subsidy exclusively to shipyards, altogether eliminating ship operators. House Hearings on H.R. 15424, 91 Cong., 2d sess. [Serial No. 91-23] p. 211. This innovation was not adopted, and the language of the House report does not appear either in the Senate report, S. Rep. 91-1080, pp. 26-27, or in the Conference report, H. Rep. 91-1555.

In fact, although shipyards were made eligible[12] along with ship operators, none has ever applied for a

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[11]The amount of the subsidy continued to be the excess of American cost over foreign, and to be designated as "the reduction in selling price". § 502(b), 46 U.S.C. § 1152(b) [1958 ed.]. No change was made in 1970. The shipyards in fact were not competing and do not compete against foreign yards for American subsidized shipping, as the Court suggests, since all such shipping is required to be constructed in American yards. § 505, 46 U.S.C. § 1155.

[12]For a different reason: "The purpose of this amendment is to encourage shipyards to participate in the design work on the vessels." S. Rep. 91-1080, p. 26.

subsidy, and all 65 vessels built under title V since the act was passed in 1970 have been subsidized on the application of operators.

Nor would the change of philosophy, if it had occurred, have been material for present purposes. It remains the owner of the vessel, not the shipyard, who must agree to operate the vessel under American flag, § 503, and exclusively in the foreign trade of the United States, § 506; and if in such foreign trade the vessel touches on certain permitted domestic ports, it is the owner who must repay the construction subsidy in proportion to the gross revenue from the domestic calls. Id. Finally, the owner is so far considered the direct beneficiary of the construction subsidy that just compensation payable to him in case of government requisition is the value of the vessel less such subsidy, § § 802, 902(b), 46 U.S.C. § § 1212, 1242.

CONCLUSION

Wherefore petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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December 4, 1975

Supreme Court, U. S.
FILED
DEC 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-800

AMERICAN MARITIME ASSOCIATION,

Petitioner,

v.

PETER G. PETERSON,
Secretary of Commerce, *et al.*,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATES MARINE INTERNATIONAL, INC., et al., Plaintiffs,

v.

Peter G. PETERSON, Secretary of Commerce, et al., Defendants-Appellants,

v.

LINER COUNCIL, AMERICAN INSTITUTE OF MERCHANT SHIPPING, Intervenor-Appellee.

AMERICAN MARITIME ASSOCIATION, Plaintiff-Appellant,

v.

Peter G. PETERSON, Secretary of Commerce, et al., Defendants-Appellants,

v.

LINER COUNCIL, AMERICAN INSTITUTE OF MERCHANT SHIPPING, Intervenor-Appellee.

Nos. 74-1499, 74-1502.

United States Court of Appeals, District of Columbia Circuit.

Argued April 17, 1975.

Decided Sept. 5, 1975.

Before MacKINNON and WILKEY, Circuit Judges, and JAMESON,* United States Senior District Judge for the District of Montana.

Opinion for the Court filed by Senior District Judge JAMESON.

JAMESON, Senior District Judge:

This is an appeal from an order holding that, under the Merchant Marine Act of 1936, 46 U.S.C. § 1101 *et seq.*, the Maritime Subsidy Board may not limit or reduce the award and payment of an operating differential subsidy (ODS) for the carriage of preference cargo, i. e., cargo reserved by law for carriage only on United States flag ships.

Plaintiff-appellant, American Maritime Association (AMA), an organization of independent unsubsidized American flag carriers, and two other plaintiffs [1]

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

1. States Marine International, Inc. and Isthmian Lines, Inc., plaintiffs below, have not appealed in No. 74–1499. The federal appellants, Peter G. Peterson, Secretary of Commerce, et al., have appealed in both cases.

brought these actions to challenge a final order of the Maritime Subsidy Board (1) requiring subsidized shipping lines to carry at least 50% non-preference cargo and providing for the proportional reduction in subsidies for vessels earning less than 50% of freight revenues from non-preference cargo; and (2) rejecting AMA's contention that the owner of a vessel built with a construction differential subsidy (CDS) on which an operating subsidy is paid should be required to rebate the construction subsidy where the vessel fails to "meet foreign-flag competition". The American Institute of Merchant Shippers (AIMS), an association of subsidized ocean carriers, intervened and contended that the Merchant Marine Act does not permit any reduction of subsidies because of the carriage of preference cargo. The district court agreed and granted intervenor-appellee's motion for summary judgment.[2]

The federal appellants, including the Secretary of Commerce, Maritime Administration, and Maritime Subsidy Board, contend that the court erred in adopting the intervenor's position insofar as it conflicts with the order of the Board. Appellant AMA contends that the court erred in failing to hold that

2. In a footnote, the court stated that the issues relating to the construction differential subsidy were precluded by the court's decision in *American Maritime Association* v. *Stans*, 329 F.Supp. 1179 (D.D.C.1971) *aff'd*, 157 U.S.App. D.C. 394, 485 F.2d 765 (1973).

the payment of any subsidy, ODS or CDS, is precluded when vessels carry preference cargo. In addition, AMA argues that the Board erred in its formulae for determining the existence of "substantial competition", in failing to find that double subsidies were being paid, and in not ruling that the subsidy program was creating unfair competition. In essence the cases involve the interaction of provisions of the Merchant Marine Act of 1936 and various acts providing a preference for American ships with respect to the carriage of certain cargo.

BACKGROUND

The Merchant Marine Act of 1936

The Merchant Marine Act of 1936 was enacted to foster the development and continued maintenance of a modern Merchant Marine fleet. The Act recognized that, "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne export and import foreign commerce of the United States to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency . . .". 46 U.S.C. 1101(a, b) (1970). To accomplish this purpose the Act established two subsidies for American flag carriers, an operating differential subsidy (ODS) and a construction differential subsidy (CDS).

Under section 601 of the Act, 46 U.S.C. § 1171(a), the Secretary of Commerce is authorized to grant an ODS only if he determines that (1) the operation of such vessel or vessels in an essential service is "*required to meet foreign*

flag competition and to promote the foreign commerce of the United States"; (2) the applicant's vessels are such as are required to enable him to operate in an essential service, "in such a manner as may be *necessary to meet competitive conditions*, and to promote foreign commerce"; (3) the applicant possesses the qualifications "necessary to enable him to *conduct the proposed operations of the vessel or vessels as to meet competitive conditions* and promote foreign commerce"; and (4) the subsidy "is necessary to place the proposed operations of the vessel or vessels on *parity with those of foreign competitors*, and is reasonably calculated to carry out effectively the purposes and policy of this Act". (Emphasis added).

The CDS is authorized under 46 U.S.C. § 1151 *et seq.* to aid in construction of vessels to be used in the foreign commerce of the United States. As with the ODS, the Secretary of Commerce is required to determine that the applicant meets various criteria, including a determination that the vessel "will meet the requirements of foreign commerce of the United States, will aid in the promotion and development of such commerce, and will be suitable for use by the United States for national defense or military purposes in time of war or national emergency". § 1151(a). Unlike the ODS there is no requirement that the granting of the construction subsidy be necessary to "meet foreign flag competition." [3]

Cargo Preference Legislation

In order to promote American flag carriers, Congress from time to time has

3. Prior to 1952, 46 U.S.C. § 1151 did require the Board to establish that the proposed construction was necessary "to meet foreign-flag competition" before granting a subsidy.

enacted statutes providing that shipments of certain American cargo must be carried exclusively or primarily in ships of United States registry. In 1904, the first of these statutes, the Cargo Preference Act, 10 U.S.C. § 2631, provided that only vessels of the United States may be used in transporting American military supplies. Numerous other preferences discussed *infra* were enacted later. In 1954 Congress amended the 1936 Act to require in 46 U.S.C. § 1241(b) that whenever government owed or financed cargo is shipped, at least 50% of the gross tonnage must be carried on privately owned vessels of United States flag registry. The effect of the acts is to guarantee that substantial quantities of both civilian and military cargo will be shipped on American vessels.

Proceedings before Maritime Subsidy Board

Seeking relief from what it considered unfair competition,[4] AMA on July 1, 1969 petitioned the Secretary of Commerce to exercise his rule making authority under the Merchant Marine Act, 46 U.S.C. § 1114(b), to adopt four rules governing administration of the ODS and CDS programs. Its proposed rules reflected AMA's position that neither ODS nor CDS could be awarded or paid, in full or in part, for the carriage of preference cargoes.[5] On December 1,

4. AMA contended that subsidy payments to vessels handling preference cargo are in contradiction to the stated purposes of the subsidy statute to subsidize ships competing with foreign vessels. Subsidized lines can use their subsidies to make bids on military and preference cargoes necessarily below the costs for unsubsidized vessels. The problem has increased with the end of the Vietnam involvement and has resulted in the demise of some unsubsidized lines.

5. AMA filed its petition on behalf of its 78 member steamship companies which were un-

1969 the Maritime Subsidy Board, on behalf of the Secretary of Commerce, commenced rule making proceedings, under Docket No. S–244, to consider the relationship between ODS and CDS and preference cargo. Extensive hearings were held in which the American Unsubsidized Lines (AUL) joined the AMA in representing the unsubsidized carriers. The AIMS, United States Lines, Inc., and the Military Sealift Command of the Department of Defense represented the subsidized lines.

On June 22, 1971 the Chief Hearing Examiner of the Board issued proposed Findings of Fact in which he recommended, *inter alia*, that the AMA proposed rule calling for the refund of ODS proportionate to revenues derived from preference cargo be adopted with respect to military and open-rated civilian preference cargo carried at premium rates. The Examiner further concluded that open-rated civilian preference cargo should not be the subject of subsidy refund. Appeal was taken to the Board.

The Board issued its Final Order and Opinion on June 12, 1972. It declined to adopt the rules proposed by the AMA and rejected the legal conclusions of the examiner. Instead the Board formulated a new rule and regulations to govern the award of future subsidy contracts.[6]

subsidized under the Act and which relied heavily on preference cargoes for their livelihood.

6. The June 12, 1972 Final Order and Opinion is reported in Pike & Fischer, 13 S.R.R. 44 (1972). The proposed regulations were published for comment in the Federal Register on July 18, 1972 (37 F.R. 14236). In response to comments minor revisions were made and final regulations, which became effective January 1, 1973, were promulgated October 4, 1972 and published in the Federal Register on October 7, 1972 as Part 280 of 46 C.F.R. (37 F.R. 21323).

In concluding that it could not accept the position of either AMA or AIMS with regard to the meaning of the 46 U.S.C. § 1171(a) requirement that vessels "meet foreign-flag competition", the Board said:

> "The Board specifically rejects AMA's contention that subsidized vessel operations must be devoted almost exclusively to carriage of cargo subject to foreign-flag competition in order to qualify for an ODS contract. The Board also rejects AMA's contention that ODS may be paid under a valid contract only for carriage of cargo subject to foreign-flag competition. We think the statute and its legislative history clearly establish that the purpose of the ODS program is not to subsidize cargo carriage but instead to subsidize operation of vessels so that the vessels are in a position to carry cargo on a competitive basis. On the other hand, we do not accept the AIMS position that the actual performance of a vessel operator as a competitor can be ignored. Rather, it is our judgment that payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience."

The Board determined that the following three principles would apply in any future award and payment of ODS:

> "First, no ODS contract will be awarded unless the applicant can establish that the vessel operations proposed to be subsidized will be conducted in a manner which will not preclude the applicant from earning a substantial portion of its gross freight revenues for each service covered by the application from the carriage of car-

goes subject to foreign-flag competition. Secondly, ODS will be paid in full for vessel operations on each service covered by an ODS contract only if a substantial portion of the gross freight revenues earned for that service are earned from the carriage of cargoes subject to foreign-flag competition. Thirdly, to the extent that less than a substantial portion of the gross freight revenues earned for a service are earned from carriage of cargo subject to foreign-flag competition, CDS payable under the ODS contract for that service will be reduced in proportion to the decreased gross freight revenues earned from such carriage. In each of the three cases, 'substantial portion' is interpreted by the Board to mean 50%."[7]

The Board issued regulations establishing a sliding ODS payment schedule for vessels having less than 50% of the cargo subject to foreign competition.

Utilizing these standards, the Board divided preference cargoes into their component parts of military preference cargoes and civilian preference cargoes. The Board held that military cargo is never subject to foreign competition; nor is civilian preference cargo carried at premium rates (agricultural commodities shipped pursuant to Department of Agri-

7. The Board specified two situations in which cargo is "subject to foreign-flag competition":

"The first is where a U.S.-flag carrier seeking to carry cargo faces at least one foreign-flag carrier who is eligible to carry the same cargo and who is reasonably likely to bid for and be available to carry the cargo. The second situation is where a U.S.-flag carrier is seeking to carry cargo and, although no foreign-flag carrier is eligible to carry the cargo, the rate at which it is carried is directly influenced by a foreign-flag carrier or carriers."

culture or AID programs which are exclusively handled by American shippers). The Board found, however, that other classes of civilian preference cargo—cargo shipped at rates established by international conferences (conference-rated), shipped at rates negotiated between the parties (open-rated), or shipped at prevailing competitive rates (world-rated)—were subject to foreign-flag competition.[8]

Order of the District Court

All of the parties moved for summary judgment. The court concluded that "the statute contemplates neither the relief sought by the Plaintiffs herein nor the partial relief granted by the Board".[9] In granting the motion of the intervenor, AIMS, the court held:

> "There is no indication that Congress ever intended that ODS payments would be either eliminated or proportionally reduced due to the carriage of preference cargo. The statute speaks in terms of necessity for foreign competition in a 'service, route, or line', not in terms of competition as to each kind of cargo carried. Thus, the Act subsidizes vessels not cargo."

The court found "convincing Intervenor's presentation of the legislative context of subsidy and preference cargo leg-

8. None of the parties sought reversal or modification of the Board order through appeal to the Secretary. Instead AMA and States Marine International filed their complaints in these actions in August, 1972. A motion of AIMS for summary judgment for failure to exhaust administrative remedies was denied.

9. AIMS did not seek affirmative relief against the Board, because of its "uncertainty as to the actual extent to which the regulations will injure AIMS members". AIMS does contend, however, that the position of the Board is wrong and that the AMA proposal "would destroy a number of AIMS members". (Appellants' Brief, p. 34).

islation and the absence of any affirmative indications of Congressional action to alter an administrative interpretation of 37 years standing, especially where Congress was aware of the situation and in the interim enacted rather specific amendments to the statutes in question." [10]

With this background, we turn to the issues raised by the respective parties on these appeals.

I. *ODS AND THE CARRIAGE OF PREFERENCE CARGO*

The primary issue is whether, under the Merchant Marine Act of 1936, when a vessel carries preference cargo, (1) any award or payment of ODS is precluded, as plaintiff-appellant, AMA, contends; or (2) no limitation or reduction in ODS may be made by the Board, as the court found and intervenor-appellee, AIMS, contends; or (3) the requirements and reductions imposed by the Board are permissible under its rule making power, as the Board found and the federal appellants contend.

A. *The 1936 Act*

[1] The language of the Merchant Marine Act of 1936 and its legislative history indicate that the legislation was

10. The district court rested its decision on an opinion of the Comptroller General, Opinion 10264 (1966). In that opinion the Comptroller General advised Senator Paul Douglas that ODS should not be reduced for carriage of military cargo:

> ". . . we believe that this legislative background and the long-established administrative subsidy is payable without reduction, even though a part of the cargo carried on a particular voyage is military cargo which is reserved for U.S.-flag vessels."

intended to help develop an American merchant fleet that would be competitive with foreign flag fleets. The payment of operating subsidies was aimed toward this goal and is the primary tool Congress sought to use in bringing American shippers to a parity with foreign competitors.

Section 601(a) of the Act, 46 U.S.C. § 1171(a), which was set out above, provides that the payment of subsidies to promote American shipping may be granted only if required to meet "competitive conditions". Section 603(b) of the Act, 46 U.S.C. § 1173(b), which provides the formula for determining the amount of subsidy which may be awarded, states that the payment shall be made in such a way as to equalize the costs of American vessels and ships of foreign registry which are "substantial competitors" with their American counterparts. Section 604, 46 U.S.C. § 1174, provides for additional subsidies to offset the effect of U.S. aid which may be paid to "foreign competitors".

This orientation toward paying subsidies in order to meet foreign competition is indicated also in the legislative history. In 1935, President Roosevelt in proposing the legislation spoke of the need to match subsidies given by other countries to their merchant ships in order to maintain "fair competition".[11] Committee reports to Congress contained the same type of statements.[12] Two witnesses testifying before House and Senate Committees were even more explicit in stating the objective of the subsidy measures. Alfred Haag, Chief Division of

11. H.R. Doc. No. 118, 74th Cong., 1st Session at 1 (1935).

12. *Id.* at 29, 30. Senate Rep. No. 898, 74th Cong., 1st Session at 2 (1935).

Shipping Research, United States Shipping Board Bureau, Department of Commerce, stated:

> "If we provide the aid that is necessary to place the American shipowner on an equality with the foreign shipowner, and also if we match the aid that other countries are rendering their merchant ships . . . we will also have ships that will enable American industry to go into the foreign field and sell its products." [13]

Karl Crowley, Solicitor of the Post Office and a chief draftsman of the Merchant Marine Act testified in response to a question about whether a subsidy would be awarded to ships not having foreign competition that:

> ". . . . it [the Act] is intended . . . . to provide for a subsidy to put our shipping on a parity with other foreign competitors. Naturally, if they have an exclusive trade, where there is not any competition at all, there is nothing to put them on a parity with." [14]

[2] The Act and its history make it clear that the operating subsidy established in 46 U.S.C. § 1171 was intended by Congress to be paid in order to meet foreign competition. It does not appear that Congress intended that the subsidy would compensate shippers which had no actual or potential competition from foreign lines.

B. *Cargo Preference Legislation*

Legislation requiring that certain shipments be made on United States ships was enacted both before and after the

13. Hearings on H.R. 7521 before House Committee on Merchant Marine and Fisheries, 74th Cong., 1st Session at 833 (1935).

14. Hearings on S. 3500, S. 4100 and S. 4110 before the Senate Committee on Commerce, 74th Cong., 2d Session at 60–61 (1935).

Merchant Marine Act of 1936. As early as 1904, Congress provided that American military cargo be shipped on American vessels. The provisions of 15 U.S.C. § 616a, enacted one year before the Merchant Marine Act required cargoes obtained through government loans to be shipped on American vessels. The 1936 Act itself created certain classes of preference cargo. Section 405 (since repealed) provided preference for shipments of United States mail. Section 212(d), 46 U.S.C. § 1122, called for the Board to seek cargo preferences. Section 901(a), 46 U.S.C. § 1241, required federal employees to travel on United States ships. In addition, sections 506 and 605(a) of the Act provide for certain reductions in subsidies when American ships are carrying domestic cargo which is completely protected from foreign competition. Of course, the cargo preference legislation primarily in question, 46 U.S.C. § 1241(b), providing that 50% of the relief and aid cargoes be carried in United States flag vessels, was not enacted until 1954, eighteen years after the passage of the Merchant Marine Act.

Intervenor-appellee argues that the cargo preference provisions predating the Act, contained in the Act itself, and enacted subsequent to its passage indicate a Congressional awareness of preference laws over the three decades since the Merchant Marine Act established the operating differential subsidy. It is contended that this awareness coupled with Congressional inaction indicates that Congress did not intend that the subsidies be affected by cargo preferences. According to the Intervenor, "Where no provision was made, no subsidy reduction was intended."

[3, 4] It is true that the legislative history of the various preference acts

manifests a Congressional awareness that subsidies might be paid to preference cargo carriers. In fact, it appears that Congress intended that subsidized vessels could carry preference cargo.[15] Recently the Ninth Circuit held that the Merchant Marine Act does not prohibit the carriage of preference cargo by subsidized carriers. *Columbia Steamship Company, Inc.* v. *American Mall Line, Ltd.* et al., 510 F.2d 29 (9th Cir. 1975). We agree and thus reject the contention of AMA that no subsidies may be paid to vessels carrying preference cargo.

However, while the Act may contemplate the payment of subsidies to preference carriers, we agree with the federal appellants that the legislative history does not show that Congress was aware over the years that subsidized lines might end up with a concentration of preference cargo not subject to foreign flag competition, as the plaintiffs maintain has occurred and which precipitated this litigation.[16] There is nothing to in-

15. For example, during the debate in the House on the Wheat for Pakistan Act, Rep. Shelly stated in 99 Cong.Rec. 7091:

> "It does not make sense for us to start the building of them to subsidize the operation of them, and then give them nothing to carry . . . So, as a result, the policy was established that at least 50 percent of this material that we give them . . . should go in our vessels so that we would not be wasting the money that we spent to build them and the money we paid to subsidize the operation of them; so that we could keep them alive and keep them going."

16. The Examiner found, *inter alia*, that (1) subsidized lines participated significantly in the preference cargo market, (2) subsidized and unsubsidized lines in some instances compete vigorously for the carriage of military and open-rated civilian preference cargo not subject to foreign competition, and (3) on some routes subsidized lines concentrated heavily on

dicate that Congress ever considered the problem of a possible concentration of preference cargoes among subsidized lines until 1970. That year Congress passed Public Law 91-469, which substantially amended the Merchant Marine Act.

Informed during the hearings on the 1970 amendment of the proceedings in Docket No. S-244, which were at that time awaiting Board determination, the respective House and Senate committees stated that their recommendations were not to be construed as indicating a position with respect to the Board proceedings,[17] and witnesses at the committee hearings stated that the amendments would not influence the outcome of the proceedings.[18] It would have been a simple matter to resolve the issue through appropriate legislation but Congress left the solution of the subsidy-preference cargo problem to the Maritime Subsidy Board by providing in Section 40(a) of the 1970 Act (84 Stat. 1037) that:

"Nothing in section 16 of this Act amending section 603 of the Merchant Marine Act, 1936, or in the contracts made thereunder, shall be deemed to affect or change existing law or contracts with respect to the proceedings now pending before the Secretary of Commerce relating to the payment of subsidy in respect of cargoes covered by section 901(b)(i) of the Merchant Marine Act, 1936, section 616(a) of ti-

carriage of preference cargo not subject to foreign-flag competition.

17. See H.Rep.No.91-1073, 91st Cong., 2d Sess. at 39 (1970) and S.Rep.No.91-1080, 91st Cong., 2d Sess. at 34 (1970), U.S.Code Cong. & Admin.News 1970, p. 4188.

18. See 1970 S. Hearings at 126 and 1970 H. Hearings at 647.

tle 15, United States Code, or section 2631 of title 10, United States Code."

And since there is no indication that Congress knew of the problem until 1970 it cannot be taken to imply approval of a policy that subsidies be awarded without regard to the competitive nature of the shipments.

C. *Decision of the Board and Rule Proposed for Adoption*

Based on a review of an "extensive factual record" developed through "extensive hearings", the Maritime Subsidy Board, in a detailed opinion and order, concluded that the Board's previous policy of awarding subsidies to preference cargo carriers without regard to the competitive nature of their shipments required modification. The Board noted that before the proceeding in Docket No. S–244 the relationship between ODS payments and cargo subsidy laws was never examined in depth by the Board or its predecessors.[19] With "exceptions of minor significance", the Board had not theretofore drawn any distinction between carriage of preference cargo and non-preference cargo. The economic data presented[20] convinced the Board

19. AIMS refers to reports to Congress from various government agencies, prior to the S–244 proceedings, showing an increase in the carriage of preference cargo subsidized lines. We agree with the federal appellants, however, that these reports did not provide either the Board or Congress a basis, for concluding, prior to the S–244 proceedings, that subsidized lines were concentrating heavily on the carriage of preference cargo to the exclusion of substantial amounts of cargo open to foreign-flag competition.

20. The data included subpoena responses filed by every U.S.-flag carrier operating in the U.S. foreign commerce, reports and testimony of economic consultants for the parties, and testimony (and supporting documentation) of numerous government agencies (including all agencies responsible for movement of prefer-

that this policy should be changed. The Board concluded on the basis of the evidence presented and its interpretation of the relevant statutes that the rule it proposed for adoption reflected the competitive requirements of the Merchant Marine Act as they relate to carriage of preference cargoes [21] and should govern the future administration of the ODS and CDS programs. The Board held that the rule would apply prospectively to all ODS contracts existing on the effective date of the rule [22] and to all new ODS contracts made after that date.[23] The order provided further that nothing stated therein "should be construed as rendering illegal any prior acts, policies, rulings or interpretations of the Secretary, the Board or the Maritime Administration (and predecessor bodies) under the ODS and CDS programs".

[5] The question arises as to whether the change in policy, particularly with respect to existing contracts, could be effected in the rule making proceeding conducted by the Board. In Section

ence cargoes) and officials of subsidized and unsubsidized carriers.

21. The Board recognized that the Act does not require absolute and complete foreign competition, but rather "substantial" competition.

22. The AIMS members have 20 year operating subsidy contracts made in the period 1955–1958.

23. In rejecting AIMS' argument that any rule adopted may not be applied to existing ODS contracts, the Board noted that all contracts provide that:

> "In order to induce favorable action upon its application for financial aid provided for in this Agreement the Operator . . . does hereby warrant and represent, among other things, as follows . . .
>
> H. . . . *Events of Default.* The following shall constitute events of default under this agreement:
>
> . . . . .

204(b) of the 1936 Act, 46 U.S.C. § 1114(b), the Secretary of Commerce was "authorized to adopt all necessary rules and regulations to carry out the powers, duties and functions vested in him by the Act". We agree with the federal appellants that under this grant of authority the Secretary, and through him the Board, has broad discretionary authority to deal with the everchanging technological and economic conditions of the commercial shipping industry, as long as its actions are reasonable and consistent with the 1936 Act.[24]

Section 606 of the Act, 46 U.S.C. § 1176, provides for Board review and readjustment of future ODS payments. The Board "on its own motion or application of the contractor shall, after a proper hearing, determine the facts and make such readjustment in the amount of future payments as it may determine to be fair and reasonable in the public interest. . . . Its decision shall be based upon and governed by the changes which may have occurred since the date

(f) Failure by the Operator to comply with any applicable provision of the Act, any law administered by the . . . Maritime Administration, *or any rule or regulation of the . . . Maritime Administration published in the Federal Register, relating to the operation of subsidized vessel(s).*" (Emphasis added by Board).

24. The report of the Senate Committee on Commerce noted:

"Title II creates a Maritime Authority . . . The Authority is given a considerable amount of discretion in the solution of its problems. This discretion is necessary since many questions will require prompt treatment. Shipping is a business of a highly competitive and changing nature, and its governmental contact must be given the power to prompt decision in dealing with situations as they arise."

S.Rep.No.713, 74th Cong., 1st Sess. at 4 (1935).

of the said contract." The decision "shall be promulgated in a formal order, which shall be accompanied by a report in writing in which the Board shall state its findings of fact".

The question is thus whether the contractors received a "proper hearing" within the meaning of Section 606. It is clear from the record and all parties agree, that the hearings conducted by the Board were extensive and that all interested parties presented evidence and briefs in support of their respective positions. In its motion to intervene in these cases, AIMS stated that it is an association "composed of 12 steamship companies, all but one of which is a party to an operating-differential subsidy ('ODS') contract under the Merchant Marine Act, 1936, and each of which owns and/or operates certain vessels built with the assistance of construction-differential subsidy ('CDS') under said Act"; and that "AIMS was a party to Maritime Subsidy Board Docket S-244, representing the interest of its members in that proceeding". It sought and was granted intervention under F.R.Civ.P. Rule 24(a).[25]

[6] Moreover, as noted *supra* (Note 23), all ODS contracts provide that "failure to comply with . . . any rule or regulation by the Maritime Administration published in the Federal Register, relating to the operation of subsi-

25. AIMS' memorandum in support of its motion reads in part:

"First, AIMS has an interest in the transaction. The standard is 'primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.' *Nuesse, supra*, 385 F.2d at 700. [*Nuesse*] v. *Camp*, [128 U.S.App.D.C. 172,] 385 F.2d 694 (D.C.Cir.1967). AIMS is clearly concerned. Decision of the issues raised

dized vessel(s)" shall constitute an event of default under the contract. In our opinion the Board was correct in concluding that by reason of this provision each ODS contract "is expressly subject to any reasonable interpretation of the 1936 Act by the Maritime Administration and any rule or regulation, applied prospectively, implementing such interpretation".

[7, 8] While a close question of statutory intent is presented, we conclude that in the circumstances of this case a hearing received in the context of formal rule making constituted a "proper hearing" and the proposed rule may be applied prospectively with respect to both existing and new contracts.

It is next contended that the long standing administrative interpretation of the Act absent affirmative action by Congress precludes the Board's order and proposed rule. While the Board has not heretofore adopted any rule and in general has not in the past drawn a distinction between preference and non-preference cargoes in awarding subsidy contracts, it has in a number of decisions considered whether the vessel service as a whole met foreign flag competition. Although those cases vary in factual determinations and did not consider the precise question here presented, they do show the Board has clearly recognized its "responsibility to determine, among oth-

by plaintiff's complaint is of paramount importance to its member steamship companies which are ODS contractors and which as a matter of course carry reserved cargoes in substantial volumes. In these circumstances and with 'the greater impetus to intervention that inheres in administrative cases' [id.], AIMS must be considered to have the requisite interest in the transaction."

er things, what constitutes foreign-flag competition on a particular trade route, and whether such competition is substantial".[26] The Board held also that "diminution of competition must be considered in computing the amount of subsidy to be awarded" and "where foreign-flag competition is eliminated, the basis for award disappears. So, too, where competition has diminished from the level existing upon computation of the award, the basis for the award may be affected to the extent of the change in competition".[27] We agree with the federal appellants that the prior cases do not support the arguments of either AMA or AIMS and that the Board's interpretation of the foreign-flag competition requirement of section 601 is "consistent with and a further development of the interpretation contained in prior administrative decisions".

[9, 10] Nevertheless, it is true, as the district court concluded and intervenor-appellee argues on this appeal, that the rule proposed by the Board in Docket No. S–244 does change a long standing administrative interpretation and that no affirmative action has been taken by Congress to change that interpretation. We are not persuaded, however, that under the factual situation and relevant statutes discussed *supra* the Board may not change its policy through adoption of the proposed rule. The question of an agency's power to change an established practice without legislative mandate has been considered by many courts. While the decisions are not uniform, due in

26. *Review of Grace Lines Subsidy*, Route 2, 4 F.M.B. 40 (1952).

27. *Lykes-Harrison Pooling Agreement*, 4 F.M.B. 515 (1954). *See also American President Lines, Ltd.*—Subsidy, Route 29, 4 F.M.B. 51 (1952); *Review of Mississippi Shipping Co.*

large part to varying factual situations, the better rule appears to be that an agency is free to act when conditions change and is not tied to past practices, as long as its decisions are fairly reasoned and considered.

In *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*, 147 U.S.App.D.C. 175, 183, 454 F.2d 1018, 1026 (D.C.Cir.1971) this court stated that ". . . an administrative agency concerned with furtherance of public interest is not tied to rigid adherence to its prior rulings." In *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 74 U.S.App.D.C. 351, 358, 123 F.2d 155, 162 (1941), *cert. denied*, 315 U.S. 806, 62 S.Ct. 640, 86 L.Ed. 1205 (1942), this court held that succeeding department heads may reverse even a well established practice if convinced that the past course of action was incorrect.

The Supreme Court in *Helvering* v. *Wilshire*, 308 U.S. 90, 60 S.Ct. 18, 84 L.Ed. 101 (1939) considered a contention much like that of AIMS, that the enactment of statutes by Congress after administrative regulations had been issued precludes the Agency from changing those rules. In *Helvering* at 100–101, 60 S.Ct. at 24 the Court stated:

> "It does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by reenactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers."

—Subsidy Route 20, 4 F.M.B. 68 (1952); *Review of Farrell Lines*—Subsidy, Route 15A, 4 F.M.B. 117 (1952); *Moore-McCormack—Swedish Lines Sailing Agreement*, 4 F.M.B. 558 (1955).

[11, 12] As noted *supra*, the district court relied heavily on a 1966 opinion of the Comptroller General advising Senator Douglas that ODS should not be reduced on a voyage basis for carriage of military cargo. While this opinion might be interpreted to mean that the 1936 Act does not authorize abatement of subsidy for any carriage of preference cargoes, we are persuaded that the Board was correct in concluding that the ruling "cannot be read that broadly". The opinion did not consider the issue presented to the Board in this proceeding of whether foreign-flag competition is being met when the operation of vessels for *annual* service derives more than 50% of gross freight revenues from cargoes not subject to foreign competition. Rather it held that ODS is "payable, without reduction, even though a part of the cargo carried on a *particular voyage* in *military cargo* is reserved for U.S. flag vessels". (Emphasis added). The 1966 opinion of the Comptroller General does not in our opinion preclude the adoption of the rule proposed by the Board. Moreover, the opinion would not be binding on the Board, particularly under a different factual situation.

Based upon the provisions of the Merchant Marine Act of 1936 and its legislative history, the interaction of the operating subsidy provisions of the Act and the cargo preference statutes, and the evidence considered by the Board following extensive hearings, we conclude that the determination of the Board and the proposed rule to effectuate its change in policy are proper. The Act consistently speaks of awarding subsidies only to vessels "meeting foreign competition". The legislative history, however, indicates that Congress had contemplated the payment of some "double subsidies" to ship-

pers carrying preference cargo. Whether or not this is "unfair competition", as AMA contends, it was foreseen by Congress. The Board's rule reducing subsidy when a vessel is not in "substantial competition" appears to strike a sound balance between the intention of Congress and the competitive needs of the industry. Additionally, the Board's decision that subsidies should be based upon the amount of competition cargo carried during the year rather than upon other formulae suggested by the parties finds support in the language of the Act, which speaks of "service" instead of cargo or voyages.

[13] Under the Administrative Procedure Act, 5 U.S.C. § 706, a reviewing court should not overturn the determination of an administrative agency unless it is "unsupported by substantial evidence" or is not in accordance with law. This court has held that this standard applies when a court is reviewing formal rule making proceedings under 5 U.S.C. § 553. *Automotive Parts & Accessories Association* v. *Boyd*, 132 U.S.App.D.C. 200, 407 F.2d 330, 337 (1968). The proceedings in Docket No. S–244 were formal proceedings.[28] We find that the decision of the Board is supported by substantial evidence and a proper interpretation and application of the law.

28. It should be noted that 5 U.S.C. § 553 did not require the Board to hold formal hearings to consider subsidy adjustments. However, as the district court stated regarding the Docket No. S–244, Sub. 1 proceedings, § 553 did not preclude the Board from choosing "to make the proceeding subject to the most rigorous requirements of the Administrative Procedure Act." *American Maritime Association* v. *Stans*, 329 F.Supp. 1179, 1182 (D.D.C.1971), *aff'd*, 157 U.S.App.D.C. 394, 485 F.2d 765 (1973). When formal proceedings are held, the "substantial evidence" standard in 5 U.S.C. § 706 is applicable.

II. *CDS AND THE CARRIAGE OF PREFERENCE CARGO*

[14] AMA's appeal in No. 74–1502 raises the issue of whether the owner of a vessel built with a construction differential subsidy on which an operational subsidy has been paid is receiving a double subsidy and should be required to rebate the construction subsidy. The district court did not consider this issue, but noted that the "issues relating to construction differential subsidy were directly reviewed" in *American Maritime Association* v. *Stans, supra,* (note 28). The court viewed "such issues as precluded by the decision" in *Stans*. *Stans* was concerned with a Board order in Docket S–244, Sub. 1 (October 13, 1970) in which the Board ruled that the 1936 Act did not prohibit the carriage of military cargoes on vessels built with CDS and upheld charters to Military Sealift Command. In its order in Docket S–244, (June 12, 1972) the Board noted the opinion of the district court in *Stans* and extended "its conclusions" to hold that a vessel built with CDS may engage in carriage of preference cargo without abatement of subsidy. We agree with the Board and the district court on this issue.

The provision for CDS is contained in Title V of the Merchant Marine Act of 1936, 46 U.S.C. § 1151 *et seq.* As originally enacted Title V prescribed criteria for awarding CDS similar to those for ODS, including the requirement that the vessel be used in a service which was meeting foreign competition.

In 1952, however, Congress amended Title V and deleted reference to the requirement that a vessel which had received CDS be used to meet foreign com-

petition.[29] Instead, the new criteria called for the Board to find that the vessel was to be used in "foreign commerce".[30] Again in 1970, the CDS provisions of the Merchant Marine Act were amended, allowing subsidies to be paid to shipyards as well as purchasers of vessels. The Report of the House Committee on the 1970 amendment made it clear that CDS has an entirely different purpose than ODS: "[T]he construction subsidies are subsidies to the shipyards, not to the shipowners." [31]

The purpose of the CDS program is to subsidize shipyards of this country to enable them to compete effectively with foreign shipyards. The subsidy allows a purchaser to buy a ship in the United States for a price equivalent to that charged by a foreign shipyard. The only restrictions on payment of CDS listed in 46 U.S.C. § 1151(a) are that the ship receiving subsidy be registered in the United States and be engaged in foreign commerce. Congress made no distinction between domestic purchasers who could or could not avail themselves of CDS. Instead, the section provides that all ship purchasers who qualify may buy ships which are eligible for CDS payments. The Act does not distinguish between those carrying preference cargo and

29. The only reference to foreign competition regarding CDS is in the general definition section of the Act, 46 U.S.C. § 1244(a). That section states that "foreign commerce" shall include for the purpose of CDS certain vessels trading between foreign ports if subsidy will enable them to compete with foreign-flag carriers. This section does not make foreign competition a prerequisite of a CDS award. Instead it expands the definition of foreign commerce to include certain vessels which perhaps would not otherwise be included as CDS recipients.

30. 46 U.S.C. § 1151(a).

31. House Rep. No. 91-1073, 93 Cong.2d Sess., p. 30.

those not carrying such cargo. A requirement that certain purchasers rebate their subsidy due to the type of cargo they carry would be contrary to the language in section 1151(a) and inconsistent with the Congressional purpose behind CDS of encouraging American ship building.

[15] The wording of the Merchant Marine Act and its history make it clear, in our opinion, that Congress did not intend to relate the payment of CDS to the vessel's actual involvement in foreign competition, nor require a rebate of CDS when a recipient ship hauls preference cargo. This conclusion is further supported by the analysis of the Board and by this court in the *Stans* decision.

CONCLUSION

We conclude that the order of the Maritime Subsidy Board in Docket S–244 is a reasonable and proper determination of a difficult and complex situation, both factually and legally, and that the rule prepared by the Board may properly be adopted. We remand to the district court for a modification of its order in accordance with this opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MARITIME ASSOCIATION
v. CIVIL ACTION
1576-72

PETER G. PETERSON,
SECRETARY OF COMMERCE

* * * CONSOLIDATED

STATES MARINE INTERNATIONAL,
INC., et al.

v. CIVIL ACTION
1667-72

PETER G. PETERSON,
SECRETARY OF COMMERCE

FILED
FEB 7 1974
JAMES F. DAVEY, Clerk

MEMORANDUM AND ORDER

These consolidated actions seek review of a decision of the Maritime Subsidy Board, Department of Commerce,[1] construing and applying the operating-differential subsidy (O.D.S.) provisions of Title VI of the Merchant Marine Act of 1936, as amended, 46 U.S.C. §1171 et seq. Plaintiffs in Civil Action No.

[1] Docket S-244, Payment of Operating Subsidy for Carriage of Preference Cargo, Final Order and Opinion June 12, 1972.

1667-72 also seek a declaratory judgment on the meaning and application of these statutory provisions. Plaintiffs in both actions are unsubsidized U.S. flag shipping operators seeking to halt O.D.S. payments now being made to other U.S. flag operators for carriage of cargo reserved by law for carriage only on U.S. flag ships (preference cargo). In July 1969, the American Maritime Association (A.M.A.) petitioned the Secretary of Commerce to initiate a rule-making proceeding to consider proposed rules eliminating the "double subsidy" which results when a ship receiving O.D.S. payments carries preference cargo, which travels at inflated U.S. rates rather than at world-competitive rates.[2] The Secretary referred the Petition to the Maritime Subsidy Board, the agency which administers the subsidy program. The Board ordered a full hearing on the proposed rules. The American Institute of Merchant Shipping (A.I.M.S.) joined the rule-making proceeding on behalf of the subsidized shipping lines, and subsequently sought and was granted Intervenor status herein. After lengthy hearings and development of a substantial factual record, on June 22, 1971, the hearing examiner (now Administrative Law Judge) issued Findings of Fact substantially agreeing with the

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[2] The Petition and Rule-Making Proceeding also related to construction differential subsidy (C.D.S.) pursuant to Title V of the Merchant Marine Act of 1936, as amended, 46 U.S.C. § 1151, et seq. The issues relating to construction differential subsidy were directly reviewed by the Court in American Maritime Association v. Stans, 329 F.Supp. 1179 (D.D.C. 1971), aff'd 485 F.2d 765 (D.C. Cir. 1973). Plaintiff A.M.A. attempts to raise collaterally herein issues relating to the construction differential subsidy. The Court views such issues as precluded by the decision cited.

position of the Petitioners, and recommending that O.D.S. payments be reduced in direct proportion to the amount of preference cargo carried.[3] On review, the Maritime Subsidy Board, on June 12, 1972, entered a Final Opinion and Order substantially disapproving the conclusions of the Hearing Examiner, but granting Plaintiff-Petitioners partial relief in requiring that O.D.S. ships carry at least 50% non-preference cargo.[4] The present actions followed, and are now before the Court on cross-motions for summary judgment. The Court agrees that the issues here are primarily legal and that there is no genuine issue of material fact. Summary Judgment is therefore appropriate.

The central issue herein is whether the statute requires or permits the Maritime Subsidy Board to limit payments of operating differential subsidy on the basis of the cargo carried. Secondary issues arise only if the answer to this question is affirmative. The Court has examined thoroughly the extensive record herein, the language and legislative history of the Act, past practice, and prior construction of the Act by the Board, the Comptroller General (Opinion B-159245),

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[3] The Examiner's decision differentiates among several different varieties of preference cargo, as do the parties and the Board. In light of the result reached, however, the Court finds these distinctions of no consequence herein.

[4] More specifically, the Board required the reduction of subsidy, though not necessarily pro-rata reduction, where less than a substantial part (50%) of the cargo carried on any leg is commercial cargo. See Board Rule 1, Appendix C to Final Opinion and Order, 37 Fed. Reg. 14236 (July 18, 1972), revised 37 Fed. Reg. 213323 (October 4, 1972), 46 C.F.R. Part 280.

and by the court in *Columbia Steamship Co. v. American Mail Line, et al.*, Civil No. 71-132 (U.S.D.C. D. Ore. September 7, 1972). On this basis the Court concluded that the statute contemplates neither the relief sought by Plaintiffs herein nor the partial relief granted by the Board. Accordingly, Intervenor's Motions for Summary Judgment will be granted.

There is no indication that Congress ever intended that O.D.S. payments would be either eliminated or proportionally reduced due to the carriage of preference cargo. The statute speaks in terms of necessity for foreign competition in a "service, route, or line," not in terms of competition as to each kind of cargo carried. Thus the Act subsidizes vessels, not cargo. This is not to say that Congress might not have spoken in terms of cargo if it chose, nor that the factual record herein does not present a strong argument on policy grounds that the statutory framework should be altered. It is to say simply that these arguments are misdirected when offered to this Court or to the Maritime Subsidy Board rather than the Congress.

The Court finds convincing Intervenor's presentation of the legislative context of subsidy and preference cargo legislation and the absence of any affirmative indications of Congressional action to alter an administrative interpretation of 37 years standing, especially where Congress was aware of the situation and in the interim enacted rather specific amendments to the statutes in question.

In light of the already massive size of the present record, and the straightforward nature of the issue in the Court's view, the Court is content to rest upon these views and the rationale of the Comptroller

General in Opinion B-159245, SRR 10,264 (1966).

Upon the above considerations, and upon consideration of the entire record herein, it is this 7th day of February, 1974,

ORDERED, that Plaintiffs Motions for Summary Judgment be and hereby are Denied, and it is

FURTHER ORDERED, that Intervenor's Motions for Summary Judgment be and hereby are Granted.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

(S E R V E D)
(June 12, 1972)
(MARITIME SUBSIDY BOARD)
(MARITIME ADMINISTRATION)

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

DOCKET NO. S-244

FACT-FINDING HEARING RE: PAYMENT
OF SUBSIDY FOR CARRIAGE
OF PREFERENCE CARGOES

In the matter of a fact-finding hearing ordered by the Maritime Subsidy Board on December 1, 1969, on

certain specified items relating to a referral by the Secretary of Commerce of a petition by American Maritime Association dated July 1, 1969, for the issuance of rules governing the award and administration of operating and construction-differential subsidy contracts and the carriage of preference cargoes.

FINAL OPINION AND ORDER OF THE MARITIME SUBSIDY BOARD

Andrew E. Gibson, Chairman; Robert J. Blackwell, Member; and James S. Dawson, Jr., Alternate Member

INTRODUCTION

By petition filed before the Secretary of Commerce (Secretary) on July 1, 1969, the American Maritime Association (AMA) has requested that the Secretary exercise his rule-making authority under the Merchant Marine Act, 1936, as amended (Act),[1] to adopt four rules governing administration of the operating-differential subsidy (ODS) and construction-differential subsidy (CDS) programs of that Act. The four proposed rules[2] (designated AMA Rules 1, 2 3A and 3B) together raise one fundamental question, namely, whether ODS and/or CDS may be paid under the Act for the carriage

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[1] 46 U.S.C. § 1101 et. seq.

[2] The full text of the AMA rules is set out in Appendix A.

of cargoes required by law to be carried on U.S.-flag vessels (hereinafter "preference cargoes"). It is AMA's position that neither ODS nor CDS may be paid, in full or in part, for the carriage of preference cargoes and that the proposed AMA rules should be adopted to reflect this limitation. AMA asserts this position on behalf of the majority of its 78 member steamship companies who are unsubsidized under the Act, who rely principally on carriage of preference cargoes for their livelihood, and who object to competition for this cargo by carriers receiving subsidy.[3]

SUMMARY OF THE PROCEEDINGS

Pursuant to express delegation of authority,[4] the AMA petition was referred by the Secretary to the Maritime Subsidy Board (Board) on July 31, 1969. By order issued December 1, 1969, the Board formally commenced a rule-making proceeding to consider the relationship between ODS and CDS and preference cargo and directed its Chief Hearing Examiner to conduct a fact-finding hearing on nine specific points bearing direct relation to the basic issues raised by the AMA petition.[5] The Board's order expressly noted that,

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[3] AMA's petition is actively supported by a similar organization – American Unsubsidized Lines (AUL) – for similar reasons. For convenience, the AMA/AUL positions will be referred to throughout this opinion as the "AMA position."

[4] See Department of Commerce Organization Order 10-8, as amended January 13, 1971.

[5] On July 9, 1970, the Board issued an order requesting the taking of evidence on two additional points. The eleven points designated for evidentiary hearing are listed in Appendix B.

while the ODS and CDS programs are exempt from the rule-making provisions and hearing requirements of the Administrative Procedures Act,[6] it was nevertheless ordering a hearing so that it could make "a considered administrative review of the issues presented in the AMA petition."

The Chief Hearing Examiner conducted extensive hearings on the matters directed to him. The principal parties joining in the evidentiary proceeding (denominated Docket S-244) were AMA and AUL, representing unsubsidized carriers, and the American Institute of Merchant Shipping (AIMS), representing the subsidized carriers. United States Lines, Inc., and the Military Sealift Command (MSC) were intervenors. Waterman Steamship Corp., Central Gulf Steamship Corp., Sea-Land Services, Inc.,[7] and Matson Navigation Company were recognized as "interested third parties."

An extensive factual record was developed during the course of the hearings. The focus of the inquiry was on the years 1964, 1966, 1968 and 1969. Data was received from subpoena responses filed by every U.S.-flag carrier operating in the U.S. foreign commerce, from reports and testimony of economic consultants for the principal parties, and from testimony (and supporting documentation) of numerous government agencies (including all agencies responsible for movement of preference cargoes) and officials of subsidized and unsubsidized carriers.

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[6] See 5 U.S.C. §553(a)(2).

[7] Waterman, Central Gulf and Sea-Land were all members of AMA at the time of the hearing but with views different or potentially different from those expressed by AMA in its petition.

On June 22, 1971, the Chief Examiner served proposed Findings of Fact on all parties. Comments and exceptions were filed on August 6, 1971; responses were filed by August 30, 1971. On October 12, 1971, the Chief Examiner certified the record to the Board. At the request of counsel for AMA and AUL, oral presentations by counsel for AMA, AUL, AIMS and MSC were heard by the Board on December 14, 1971.

The Board has now reviewed the record, the Findings of Fact,[8] the comments and arguments of the parties and has determined that the rules and principles set forth in this opinion should govern administration of the ODS and CDS program.[9]

STATEMENT OF THE ISSUES

The Board has before it in this proceeding two primary issues: first, whether ODS may be paid for

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[8]The Chief Examiner's Findings included a variety of conclusions, legal and otherwise, regarding the advisability of adopting the proposed AMA rules. Since those conclusions were not requested by the Board in its order directing the fact-finding hearing, they are not considered by the Board here.

[9]It should be noted at this point that the carriers represented by the parties to this proceeding are, for the most part, engaged in liner (as opposed to bulk) operations involving carriage of freight (as opposed to passengers). For this reason, and because subsidy did not become available to bulk carriers until after this proceeding commenced, the issues raised by the parties in this proceeding relate only to liner operations involving carriage of freight. Accordingly, the rules and principles enunciated in this opinion are not intended to apply to any other type of operation.

carriage of preference cargo and, secondly, whether a vessel built with CDS may engage in carriage of preference cargo without abatement of subsidy. A third issue of subsidiary significance – whether evidence regarding carriage of preference cargo must be considered by the Board in hearings under §605(c) of the Act – is also before the Board. All three issues are raised by the AMA petition and by the proposed AMA rules.

DISCUSSION

A. Payment of ODS for the Carriage of Preference Cargo

Until this proceeding, the relationship between the cargo preference laws and the ODS program has never been addressed in depth by the Board or its predecessor bodies. The ODS program is administered by the Board in accordance with the provisions of Title VI of the Act.[10] With some exceptions of minor significance, it has been the Board's policy, in awarding contracts and paying subsidy under Title VI, not to draw a distinction between carriage of preference cargo and carriage of non-preference cargo (hereinafter called "commercial cargo").

AMA, however, has taken the position that Title VI of the Act does not in fact permit payment of ODS for carriage of preference cargo and, by the same token, does not authorize the award of an ODS contract where the service sought to be subsidized is devoted primarily

[10] 46 U.S.C. §§1171-1176.

to carriage of preference cargo. AMA's position is based on the notion that the paramount purpose of ODS is to enable U.S.-flag carriers to "meet foreign-flag competition" and that, because preference cargo is reserved to U.S.-flag carriers, there is simply no foreign-flag competition involved in its carriage. Beyond this alleged legal impediment to payment of ODS, AMA also takes the position that payment of ODS for carriage of preference cargo constitutes payment of an improper "double subsidy"[11] and promotes unfair competition by subsidized lines against unsubsidized lines. AMA has proposed the adoption of Rules 1 and 3A to remedy the alleged inadequacies of current Board policy. The effect of these rules would be to forbid the award of an ODS contract for predominant carriage of preference cargo (Rule 1) and to require abatement of ODS under a valid contract whenever preference cargo is carried (Rule 3A).

The AMA position and proposed Rules 1 and 3A are vigorously opposed by AIMS. AIMS alleges that Title VI specifically requires payment of ODS for the purpose of providing parity of U.S.-flag and foreign-flag vessel operating costs and that, while a subsidized carrier is required by Title VI to "meet foreign-flag competition," that requirement relates not to the specific type of cargo carried, but to the overall service provided. Thus, AIMS takes the position that if a carrier's overall service meets foreign-flag competition,

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[11]The term "double subsidy," used frequently in these proceedings, is defined as the payment of operating subsidy to a carrier who, by virtue of government protection through preference laws, is carrying cargo at premium rates. The operating subsidy and the rate premium are the "double" subsidies. See also fn. 28 *infra*.

the law requires no subsidy abatement and does not bar the granting of a contract because preference cargo is carried. AIMS also alleges that payment of ODS for carriage of preference cargo does not involve a double subsidy and does not promote unfair competition.

The Board addresses the three issues raised by the parties – legal prohibition, double subsidy, and unfair competition – as follows:

1. Legal Prohibition Against Payment of ODS for Carriage of Preference Cargo

There is apparent agreement among all parties – and the Board agrees – that a fundamental purpose of the ODS program is to place U.S.-flag vessels on an operating cost parity with foreign-flag operators so that the U.S.-flag operators will be in a position to compete with their foreign-flag counterparts. This basic purpose of the program is reflected in §601 of the Act[12] which provides:

> "No [application for ODS] . . . shall be approved by the Secretary of Commerce unless he determines that . . . the operation of [the] . . . vessel or vessels [for which ODS is requested] in an essential service is *required to meet foreign-flag competition*. . . ." (Emphasis added)

The unresolved question, however, is the exact substance of the phrase "required to meet foreign-flag competition." AMA's legal prohibition argument turns on

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[12]46 U.S.C. §1171(a). See also §602 of the Act, 46 U.S.C. §1172.

its interpretation of that standard; AIMS' rebuttal to the AMA position turns on its disagreement with AMA's interpretation.

Leaving to one side the very important question of what constitutes "foreign-flag competition" and focusing first on the concept of "meeting" foreign-flag competition, the AMA interpretation of §601 can be paraphrased as follows: No operator can qualify for an ODS contract unless the operation of vessels for which subsidy is sought is "required to meet foreign-flag competition." Accordingly, an applicant for an ODS contract must establish, first, that there is cargo subject to foreign-flag competition on the route he proposes to serve and, secondly, that his vessel operations will be devoted almost exclusively to the carriage of such cargo. Furthermore, once a contract is granted, payments of ODS under the contract will be made only to subsidize carriage of cargo subject to foreign-flag competition. To the extent that the operator engages in incidental carriage of cargo not subject to foreign-flag competition, he is not eligible to receive ODS.

AIMS' position excepting to the AMA interpretation may be paraphrased as follows: It is true that no operator may qualify for an ODS contract unless the operation of vessels for which subsidy is sought is "required to meet foreign-flag competition." It is also true that the operator must establish that there is cargo subject to foreign-flag competition on the route he proposes to serve. It is not true, however, that an operator must make a commitment that his vessel operations will be devoted almost exclusively to carriage of such cargo. On the contrary, the only commitment an operator must make in order to qualify for a

contract under §601 is a commitment to operate his subsidized vessels in a manner which is competitive with foreign-flag carriers for cargo. Once an ODS contract is granted, subsidy is payable under that contract to sustain vessel operations in full irrespective of whether the cargo actually carried is or is not subject to foreign-flag competition. In other words, payment is not to be gauged by the operator's actual success as a competitor with foreign-flag lines but instead on whether his service is competitive with service provided by foreign-flag lines.

After careful consideration of the parties' positions, the statute and its legislative history, the Board finds that it can accept neither the AIMS nor the AMA interpretation of §601. The Board specifically rejects AMA's contention that subsidized vessel operations must be devoted almost exclusively to carriage of cargo subject to foreign-flag competition in order to qualify for an ODS contract. The Board also rejects AMA's contention that ODS may be paid under a valid contract only for carriage of cargo subject to foreign-flag competition. We think the statute and its legislative history clearly establish that the purpose of the ODS program is not to subsidize cargo carriage but instead to subsidize operation of vessels so that the vessels are in a position to carry cargo on a competitive basis. On the other hand, we do not accept the AIMS position that the actual performance of a vessel operator as a competitor can be ignored. Rather, it is our judgment that payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience.

Accordingly, the Board has determined that, in order to satisfy the competitive standards of §601, the following three principles must apply to award of ODS contracts and payment of subsidy: First, no ODS contract will be awarded unless the applicant can establish that the vessel operations proposed to be subsidized will be conducted in a manner which will not preclude the applicant from earning a substantial portion of its gross freight revenues for each service covered by the application from the carriage of cargoes subject to foreign-flag competition. Secondly, ODS will be paid in full for vessel operations on each service covered by an ODS contract only if a substantial portion of the gross freight revenues earned for that service are earned from the carriage of cargoes subject to foreign-flag competition. Thirdly, to the extent that less than a substantial portion of the gross freight revenues earned for a service are earned from carriage of cargo subject to foreign-flag competition, ODS payable under the ODS contract for that service will be reduced in proportion to the decreased gross freight revenues earned from such carriage. In each of the three cases, "substantial portion" is interpreted by the Board to mean 50%.

Obviously, the practical impact of this interpretation of the "meet foreign-flag competition" standard depends to a great degree on a determination of what cargo is "subject to foreign-flag competition." AMA, of course, takes the position that, because preference cargo is expressly reserved to U.S.-flag vessels, it is by definition not "subject to foreign-flag competition." Accordingly, AMA would argue that only commercial cargo can be subject to foreign-flag competition and that, under the *Board's* interpretation of §601, ODS

may only be paid where at least 50% of revenues from subsidized vessel operations are earned from carriage of commercial cargo.[13]

The Board does not agree with AMA's position that only commercial cargoes are subject to foreign-flag competition. In the Board's judgment, there are two general categories of competition for cargo. The first category is where two or more carriers are eligible to carry specific cargo and each is reasonably likely to bid for and be available to carry the cargo. The second category of competition is where only one carrier is eligible to carry the cargo but the rate at which he must carry it is directly influenced or determined by an ineligible carrier or carriers. In the first case, the competition is manifested in the efforts of each competing carrier to bid the lowest rate for carriage of the cargo and still maintain a profitable operation. In the second case, the competition manifests itself in the effort of the eligible carrier to maintain a profitable operation while carrying cargo at rates influenced or determined by the ineligible carrier or carriers.

Applying these same standards, it follows that there are two situations in which cargo is subject to foreign-flag competition within the meaning of Title VI.

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[13]This argument should not be confused with AMA's actual position in this proceeding. AMA's position that preference cargo is not subject to foreign-flag competition, when coupled with *AMA's* interpretation of § 601 (summarized above at p. 7), creates the foundation for AMA's principle arguments – reflected in AMA Rules 1 and 3A – that an operator qualifies for an ODS contract only if his vessel operation is devoted almost exclusively to carriage of commercial cargoes and that ODS may only be paid under a valid contract for carriage of commercial cargoes.

The first is where a U.S.-flag carrier seeking to carry cargo faces at least one foreign-flag carrier who is eligible to carry the same cargo and who is reasonably likely to bid for and be available to carry the cargo. The second situation is where a U.S.-flag carrier is seeking to carry cargo and, although no foreign-flag carrier is eligible to carry the cargo, the rate at which it is carried is directly influenced by a foreign-flag carrier or carriers. The first situation is generally applicable to commercial cargoes on routes or in trades served by both U.S.-flag and foreign-flag carriers. The second situation is generally applicable to preference cargoes carried at rates directly influenced or determined by foreign-flag carriers.

The three principles determined by the Board to govern award and payment of ODS, then, may be restated as follows: First, no ODS contract will be awarded unless the applicant can establish that the vessel operations proposed to be subsidized will be conducted in a manner which will not preclude the applicant from earning at least 50% of its gross freight revenues for each service covered by the application from the carriage of commercial cargoes or carriage of preference cargoes at rates directly influenced by foreign-flag carriers. Secondly, ODS will be paid in full for vessel operations on each service covered by an ODS contract only if at least 50% of the gross freight revenues earned for that service are earned from the carriage of commercial cargoes or carriage of preference cargoes at rates directly influenced or determined by foreign-flag carriers. Thirdly, to the extent that less than 50% of the gross freight revenues earned for a service are earned from carriage of commercial cargoes

or carriage of preference cargoes at rates directly influenced or determined by foreign-flag carriers, ODS payable under the ODS contract for that service will be reduced in proportion to the decreased gross freight revenues earned from such carriage.

Final formulation of these two principles, of course, requires a determination of what categories of preference cargo are carried at rates influenced or determined by foreign-flag carriers. According to the evidence developed at the hearings in this proceeding, there are two general categories of preference cargo; i.e., military and non-military (or civilian). Civilian preference cargo, however, can be divided into two sub-categories; conference-rated and open-rated. Finally, open-rated civilian preference cargo can be further sub-divided into open-rated cargo carried at premium rates and open-rated cargo carried at "world" rates. Based on the facts developed in this proceeding, the Board makes the following determinations with regard to each of these categories and sub-categories of preference cargo:

a. Military Preference Cargo

The Cargo Preference Act of 1904[14] provides that, absent the unavailability of such vessels at reasonable rates:

> "Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought by the Army, Navy, Air Force or Marine Corps."

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[14] 10 U.S.C. § 2631.

While there has been some uncertainty as to whether this provision requires the use of privately-owned vessels,[15] it is clear that, absent unavailability, only U.S.-flag vessels may carry American military cargo.

As a practical matter, the great preponderance of military preference cargo moves on privately-owned U.S.-flag vessels on berth service terms pursuant to shipping and container agreements or through government bills of lading. The rates at which the cargo moves are determined under a "request for proposal" (RFP) competitive bid system managed by the Military Sealift Command. Under the RFP system, carriers submit to MSC the rates at which they are willing to carry each type of military cargo moving on a designated route during two consecutive six-month cycles. Bids are evaluated by MSC and a "pecking order" is established ranking carriers in order of their bids, lowest bidder first. Military cargo is then shipped with the highest ranking carrier having a vessel in position.

While shipping industry and government officials have criticized this procurement system as one which invites establishment of non-compensatory rates highly prejudicial to all carriers competing for military cargo,[16] it is clear that the rates established are not influenced in any way by foreign-flag carriers. No foreign-flag carrier can compete or ever has competed in the RFP process; no foreign-flag carrier can carry military cargo except in

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[15]See H. Con. Res. 403, 92nd Cong., 1st Sess. (introduced September 16, 1971.)

[16]See, e.g., Federal Maritime Commission Docket No. 71-35, "Investigation of Competitive Procurement Practices on Military Cargo."

the extremely rare case of unavailability of U.S.-flag vessels;[17] and the rates are not established by an international commercial rate conference. Accordingly, military preference cargo is not a category of preference cargo carried at rates influenced or determined by foreign-flag carriers.

b. Civilian Preference Cargo

The Cargo Preference Act of 1954, §901(b) of the Merchant Marine Act, 1936,[18] provides in pertinent part:

> "Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishings of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure *that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately-owned United States-flag commercial vessels*, to the extent such vessels are available at fair and reasonable rates for United

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[17] In 1969, for example, foreign-flag carriers carried 2,769 out of 9,000,000 measurement tons (.03%) of military cargo transported.

[18] 46 U.S.C. § 1241(b).

States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas; . . . ." (Emphasis added)

Public Resolution 17, 73rd Cong., approved March 26, 1934,[19] provides:

". . . it is the sense of Congress that in any loans made by . . . any . . . instrumentality of the government to foster the exporting of agricultural or other products, provision shall be made that such products shall be carried exclusively in vessels of the United States . . . [unless the Maritime Administration certifies] that vessels of the United States are not available in sufficient numbers, or in sufficient tonnage capacity, or on necessary sailing schedules or at reasonable rates."

Those two provisions of law, along with several other minor provisions,[20] delineate the category of cargo known as civilian preference cargo. The great majority of cargo moving subject to these provisions is agricultural cargo shipped pursuant to the Agricultural Trade Development and Assistance Act of 1954 (commonly known as P.L. 480),[21] or the Foreign Assistance Act of 1961,[22] and general cargo moving under the auspicies of the Export-Import Bank.

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[19] 15 U.S.C. § 616a.

[20] See AIMS Ex. 267.

[21] 7 U.S.C. § 1691-1736.

[22] 22 U.S.C. § 2381.

(1) Conference-Rated Civilian Preference Cargo

A substantial portion of civilian preference cargo is liner cargo moving at rates set by international commercial rate conferences. While the record in this proceeding contains only sparse information about the structure and operation of the international commercial conference rate system, the evidence adduced is uncontradicted.

Generally speaking, international commercial rate conferences are formal organizations of competing U.S.-flag and foreign-flag carriers established for the purpose of fixing rates.[23] Rates are commonly fixed by a conference on the basis of commodity classifications. Conferences do not, however, have a separate commodity classification for civilian preference cargo. Thus, rates applicable to preference cargo are the same as those applicable to equivalent commercial cargo, including commercial cargo comprising the 50% of government-generated cargoes not required to move on U.S.-flag vessels. Since commercial cargo and preference cargo moving under the conference rate system are generally indistinguishable by physical characteristics, the competitive attributes of carrying conference-rated preference cargo are virtually identical to those of carrying conference-rated commercial cargo.

Because the foreign-flag carriers participating in a conference very clearly have a voice in rate deter-

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[23] All such conferences involving carriers engaged in the foreign commerce of the United States are subject to the regulatory jurisdiction of the Federal Maritime Commission under Section 14 and 15 of the Shipping Act, 1916, 46 U.S.C. § § 813-814.

minations, it is reasonable to conclude that conference-rated civilian preference cargo does constitute a category of preference cargo carried at rates directly influenced or determined by foreign-flag carriers.

(2) Open-Rated Civilian Preference Cargo

Open-rated civilian preference cargo comprises that portion of civilian preference cargo which is not conference-rated. The rates for open-rated cargo, in other words, are determined by negotiation with the shipper and not by formal agreement of competitors. In actual practice, open-rated civilian preference cargo is either carried at premium rates, i.e., rates higher than those prevailing in the world market, or "world" rates, i.e., rates the same as those prevailing in the world market.

(a) Open-Rated Civilian Preference Cargo Carried at Premium Rates

The largest sources of open-rated civilian preference cargo are the Department of Agriculture's P.L. 480 and AID's Foreign Assistance Act programs. Cargoes under these programs generally consist of wheat, rice, grain and fertilizer moving in bulk lots. Virtually all of this cargo moves at premium rates. Unlike conference-rated preference cargoes, most of the P.L. 480 and AID cargoes can be identified as preference cargo at the time of booking.

The rate premiums paid for U.S.-flag movement of these cargoes are generally considered to be the

differential between the rate at which the goods actually move – a rate set by the U.S.-flag carrier – and the lowest available bid from foreign-flag carriers for carriage of similar commodities in the trades concerned (often referred to as the "world" rate). Under the P.L. 480 and Foreign Assistance Act programs, these rate premiums are calculated by the Department of Agriculture and AID, respectively. The foreign shipper of the cargoes, who must initially pay the U.S.-flag carrier his full rate, is then reimbursed by these two agencies for the full amount of the premium. In 1969, the rate premiums averaged 100-150% of the foreign-flag rate; it is estimated that the rate premium reimbursements for these agricultural programs has approximated $100 million a year in recent years and has perhaps aggregated a billion dollars over the full life of the program.

Whatever may be the merits of the premium rate system, it is abundantly clear that U.S.-flag premium rates for open-rated civilian preference cargoes are not influenced by foreign-flag carriers but are established exclusively in the domain of U.S.-flag carriers. Accordingly, open-rated civilian preference cargo carried at premium rates is not a category of preference cargo carried at rates influenced or determined by foreign-flag carriers.

(b) Open-Rated Civilian Preference Cargo Carried at "World" Rates

It is not clear from the record in this proceeding what, if any, civilian preference cargo is carried at "world" rates. To the extent, however, that such

carriage is taking place or will take place in the future, its consideration here is important.

Precise definition of the concept of "world" rates is difficult. The prevailing description of a "world" rate is that it is the rate "prevailing in the world market," i.e., the rate at which the majority of carriers in a given trade are carrying cargo. Obviously, the carriers which are dominant in any particular trade will exercise the most influence on determination of the "world" rate. As a practical matter, the dominance of foreign-flag carriers in the trades served by both U.S.-flag and foreign-flag carriers is sufficient to warrant the conclusion that "world" rates in those trades are directly influenced or determined by foreign-flag carriers.[24] Since open-rated civilian preference cargo is virtually always carried in trades served by both U.S.-flag and foreign-flag carriers, the Board finds that open-rated civilian preference cargo carried at "world" rates is a category of preference cargo carried at rates directly influenced or determined by foreign-flag carriers.

c. Conclusion

Based on the foregoing analysis of preference cargo categories, the Board concludes that the following three final principles must govern award and payment of ODS under Title VI of the Act: First, no ODS contract will

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[24]Indeed, as indicated above in section A1b(2)(a), the "world" rate is often defined as the lowest available bid from foreign-flag carriers for carriage of given commodities in a given trade.

be awarded unless the applicant can establish that the vessel operations proposed to be subsidized will be conducted in a manner which will not preclude the applicant from earning at least 50% of its gross freight revenues for each service covered by the application from the carriage of commercial cargoes, conference-rated civilian preference cargoes or open-rated civilian preference cargoes carried at "world" rates. Secondly, ODS will be paid in full for vessel operations on each service covered by an ODS contract only if at least 50% of the gross freight revenues earned for that service are earned from the carriage of commercial cargoes, conference-rated civilian preference cargoes or open-rated civilian preference cargoes carried at "world" rates. Thirdly, to the extent that less than 50% of the gross freight revenues earned for a service are earned from carriage of commercial cargoes, conference-rated civilian preference cargoes and open-rated civilian preference cargoes carried at "world" rates, ODS payable under the ODS contract for that service will be reduced in proportion to the decreased gross freight revenues earned from such carriage.[25]

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[25]The Board's third principle – proportionate reduction of ODS for excessive carriage of cargoes not subject to foreign-flag competition – does not contravene Op. Comp. Gen. B-159245, dated October 14, 1966 (unreported). AIMS has interpreted that decision as holding that the 1936 Act does not authorize abatement of subsidy for carriage of preference cargoes, particularly military cargo. The Comptroller General's ruling, however, cannot be read that broadly. Taking into account the fact situation before the Comptroller General, the key holding of Decision B-159245 is that where military cargoes (and presumably other cargoes not subject to foreign-flag competition) constitute no more than 50% of the cargo carried by a subsidized operator on any one sailing, abatement of ODS is not authorized. Decision B-159245, pp. 3-4. The Board's third principle is entirely consonant with that holding.

Implementation of these three principles will be by Board rule under authority of § 204(b) of the Act;[26] Board Rule 1, set out in Exhibit C, is proposed for this purpose and will be published in the *Federal Register* with opportunity for public comment prior to final adoption. The rule finally adopted will apply prospectively to all ODS contracts existing on the effective date of the rule[27] and to all new ODS contracts made after such effective date.

2. The "Double Subsidy" Issue

AMA alleges in its petition that any payment of ODS to support carriage of preference cargo constitutes payment of an improper "double subsidy." In this

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[26]46 U.S.C. § 1114(b).

[27]The Board rejects AIMS' argument that any rule adopted in this proceeding may not be applied to existing ODS contracts. Existing ODS contracts provide that:

> "In order to induce favorable action upon its application for financial aid provided for in this Agreement the Operator ... does hereby warrant and represent, among other things, as follows: ...
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> H. ... *Events of Default.* The following shall constitute events of default under this agreement:
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> * * * * *
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> (f) Failure by the Operator to comply with any applicable provision of the Act, any law administered by the ... Maritime Administration, or *any rule or regulation of the ... Maritime Administration published in the Federal Register, relating to the operation of subsidized vessel(s).*" (Emphasis added)

Each ODS contract, then, is expressly subject to any reasonable interpretation of the 1936 Act by the Maritime Administration and any rule or regulation, applied prospectively, implementing such interpretation.

context, "double subsidy" is defined as payment of ODS to a carrier who, by virtue of government protection through preference laws, is carrying cargo at premium rates.[28] It is AMA's position that subsidized operators carrying preference cargo must be content with rate premiums alone[29] and cannot receive ODS in addition.

The alleged impropriety of paying "double subsidy" is grounded in the fact that the basic purpose of ODS is to establish cost parity between U.S.-flag and foreign-flag vessel operations. Payment of "double subsidy," the argument goes, decreases U.S.-flag net operating costs below the level upon which parity is based and thus violates the basic purpose of ODS. Quite obviously, this argument – which the Board accepts as valid – proceeds entirely on the assumption that the cargo preference laws do give rise to rate premiums. Thus, to the extent that preference cargo is not carried at premium rates, the objections to payment of ODS clearly have no merit. It is important, then, to examine the various categories of preference cargo to determine if, in fact, U.S.-flag carriage is accomplished at premium rates.

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[28]Note that the term "double subsidy" is not intended to imply that an operator is receiving twice as much subsidy. Rather, it means only that the operator is receiving subsidy from two sources.

[29]As discussed in section A1b(2)(a) above, the rate premium is generally considered to be the differential between the cost of U.S.-flag and foreign-flag shipping.

a. Military Preference Cargo

The method by which rates are determined for military cargo – the so-called RFP system – is described in detail in section Ala above. As indicated in that section, foreign-flag carriers have virtually no influence on military cargo rates; nor do foreign-flag carriers engage to any measurable degree in carriage of military cargo. Furthermore, military cargo is somewhat unique in its general characteristics so that it is difficult to find commercial cargo carried by foreign-flag carriers which can easily be classified as equivalent. For these reasons, it is extremely difficult to determine whether the U.S.-flag rate is a premium rate when compared to the "corresponding" foreign-flag rate for this type of cargo.

The record in this proceeding, however, is of some help in evaluating military cargo rates. AIMS, for example, produced several studies showing that in isolated instances military rates are *below* the "world" rates for comparable commercial cargo.[30] AIMS also argued that, since the Cargo Preference Act of 1904 provides that "charges made by [United States vessels carrying military cargo] may not be higher than the charges made for transporting like goods for private persons," military rates cannot by law exceed the "world" rate for comparable cargo. While several persons testified that foreign-flag liners, if eligible to carry military cargo, would probably offer lower rates,[31] there was no testimony that foreign-flag lines

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[30]See AIMS Ex. 221, pp. 6-9, 12-15, 17-37, 42; AIMS Ex. B, pp. 18-19; AIMS Ex. 242; AIMS Ex. 243.

[31]Tr. 401-402 (Brogan), 1820 (Stone), 2471 (Barker), 3434 (Lynch), 3781 (Cherington).

rates or world conference rates for similar cargo are in fact below the military cargo rates of U.S.-flag carriers.

On this record, the Board is constrained to conclude that military preference cargo cannot reasonably be said to be carried at premium rates. Accordingly, payment of ODS in accordance with the principles set forth in section A1c above for operation of a vessel which carries military preference cargo does not constitute payment of an improper "double subsidy."

b. Civilian Preference Cargo

(1) Conference-Rated Civilian Preference Cargo

As outlined in section A1b(1) above, rates applicable to conference-rated civilian preference cargo are the same as those applicable to equivalent commercial cargo, including equivalent commercial cargo carried by foreign-flag carriers. Accordingly, it would appear that there is no rate premium associated with U.S.-flag carriage of this cargo. AMA argues, however, that there is in fact a rate premium because, as a practical matter, conference rates are set at a level to cover fully allocated U.S.-flag costs and foreign-flag carriers more or less go along for a very profitable ride at the higher rate. AMA argues, in other words, that the rate premium is disguised.

AMA relies on an economic study prepared by an AMA economist, Robert Nathan, as support for this position. The Nathan Study, however, is so seriously inconsistent with other positions taken by AMA in this proceeding that the Board cannot accept AMA reliance on it here. The primary inconsistency stems from the

direct implication of the Nathan Study that, because preference cargo is carried at fully-allocated U.S. cost and because conference-rated commercial cargo is carried at the same rate as preference cargo, conference-rated commercial cargo returns fully-allocated U.S. costs without subsidy. If this were true, then unsubsidized operators should be able to compete with foreign-flag carriers for that cargo. AMA has taken a strong position, however, that the unsubsidized operators cannot meet that competition.[32] A second serious inconsistency is that, notwithstanding the Nathan Study conclusion that conference-rated commercial cargo is carried at fully-allocated U.S. costs, AMA has not taken the position which logically follows from that conclusion, namely, that carriage of commercial cargo is ineligible for ODS. Its only argument is that conference-rated preference cargo, identical in characteristics and rate to conference-rate commercial cargo, is ineligible for ODS.

In view of these inconsistencies, the Board rejects the AMA argument as being without valid support in the record and finds that conference-rated preference cargo is not carried at premium rates, disguised or otherwise.[33] Thus, payment of ODS in accordance with the principles set forth in section A1c above for operation of a vessel which carries conference-rated civilian

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[32]Nathan's analysis and AMA's position with regard to inability of unsubsidized lines to compete for commercial cargo were specifically directed at the trans-pacific trade.

[33]The Board does not reach the issue of whether a "disguised" rate premium is a proper foundation for an allegation of "double subsidy."

preference cargo does not constitute payment of an improper "double subsidy."

(2) Open-Rated Civilian Preference Cargo

(a) Open Rated Civilian Preference Cargo Carried at Premium Rates

By definition, open-rated civilian preference cargo carried at premium rates constitutes a category of preference cargo, the carriage of which generates a rate premium. Accordingly, payment of ODS for operation of a vessel carrying such cargo does, in the Board's judgment, constitute payment of a "double subsidy." The appropriate manner in which to address this "double subsidy" is discussed below in section A2c.

(b) Open-Rated Civilian Preference Cargo Carried At "World" Rates

Open-rated civilian preference cargo carried at "world" rates very clearly does not constitute a category of preference cargo carried at a premium rate, since the term "premium rate," as a practical matter, refers to a rate in excess of the "world" rate.[34] Thus, payment of ODS for operation of a vessel carrying such cargo does not constitute payment of an improper "double subsidy."

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[34]See section Alb(2) above; see also footnote 24 and accompanying text.

c. Payment of "Double Subsidy" – The Appropriate Remedy

As discussed above, it is the judgment of the Board that payment of ODS for the carriage of open-rated civilian preference cargo at premium rates is the one situation where the subsidized operator is likely to receive a "double subsidy" and thus be placed in an operating cost position more favorable than that permitted by Title VI.

The Board has available to it two courses of action in this situation. First, it can reduce the level of ODS payments to compensate for any rate premiums earned by carrying this type of cargo. Secondly, it can seek to eliminate the rate premiums. For reasons explained below, the Board chooses the latter course.

The government has long recognized that premium rates earned by U.S.-flag carriers from carriage of protected cargo are a form of indirect subsidy. This recognition has been particularly apparent in connection with bulk (as opposed to liner) operations where, until 1970, premium rates were the only form of subsidy available. In 1969, however, when the Merchant Marine Act of 1970 came before the Congress, the wisdom of continuing the premium rate subsidy system for bulk carriers was called into question. The President of the United States, for example, noted, in transmitting to Congress recommendations for a new maritime program:

> "We will propose a new direct subsidy system for [bulk] carriers thus allowing us to phase out these

> premium freight rates and reduce the costs of several nonmaritime government programs."[35]

In addition, the various bills setting forth the new maritime program all proposed extension of the direct ODS system to bulk cargo carrying services.

The maritime bill finally enacted on October 21, 1970 – known as the Merchant Marine Act of 1970 – did in fact extend the ODS program to bulk carriers. In commenting on this extension, the House Committee Report noted:

> "Another factor prompting the Administration to extend operating subsidy to U.S.-flag bulk carriers is the desire to phase out premium freight rates now paid for government sponsored cargoes carried on American-flag ships. . . . The aim of the Administration's program and the bill is to enable American bulk carriers, eventually at least, to carry government cargoes at world rates."[36]

While this proceeding does not involve payment of ODS to bulk carriers,[37] we feel that the criticism of premium rate subsidies reflected in the history of the ODS program for bulk carriers is equally applicable to premium rate subsidies for liner operations. Phase out of premium rates and encouragement of U.S.-flag carriage at "world" rates, in other words, should be the Board's objective irrespective of the type of operation involved.

In the case of open-rated civilian preference cargoes, phase out of premium rates can best be accomplished

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[35]H.R. Doc. No. 91-183, 91st Cong., 1st Sess. 4 (1969).

[36]H.R. Rep. No. 91-1073, 91st Cong., 2d Sess. 38 (1970).

[37]See footnote 9, *supra*.

by publication and enforcement of guideline rates for parcel lot carriage of such cargoes by subsidized operators. Accordingly, guideline rates will be formulated and published in regulation form by the Secretary of Commerce, acting by and through the Maritime Administration, in accordance with §901(b)(2) of the Act.[38] A minimum of 90 days will be required to prepare proposed regulations. Public comment will be invited prior to final adoption of the regulations.[39]

3. The Unfair Competition Issue

AMA's final contention with regard to ODS is that payment of ODS for operation of a vessel carrying preference cargo results in "unfair competition" by subsidized operators against unsubsidized operators. In large part, AMA's position is based on the notion that payment of ODS for carriage of preference cargo results in a "double subsidy" which gives the subsidized operator an undue and improper cost advantage. The subject of "double subsidy" has been treated in section A2 above, in a manner which effectively prevents AMA's reliance on the existence of "double subsidy" to establish its case for unfair competition. AMA, however,

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[38]46 U.S.C. § 1241(b)(2).

[39]Once rates for open-rated civilian preference cargo now carried at premium rates are reduced to "world" rates, all open-rated civilian preference cargo will, of course, fall into the category of "open-rated civilian preference cargo carried at world rates" within the meaning of Board Rule 1, Appendix C.

also bases its unfair competition argument on the more general notion that, since unsubsidized operators depend on preference cargo for a livelihood, payment of any subsidy – "double" or not – to a competing carrier places the unsubsidized carrier at an unfair disadvantage.

The Board has considered the record carefully and has failed to find sufficient evidence to support AMA's allegation that subsidized lines are in fact competing unfairly with unsubsidized lines. Looking, for example, at military preference cargo, where AMA's allegations of unfair competition are most vigorous, the record shows that, with respect to breakbulk operations, unsubsidized carriers greatly increased their carriage of military cargo during the period of record and earned respectable profits despite some instances of underbidding by subsidized breakbulk operators on trades offering large volumes of military cargoes. It is true, of course, that the unsubsidized breakbulk fleet is rapidly being scrapped or sold foreign.[40] This status, however, seems more a product of age and condition of vessels and decreased volume of breakbulk military cargo than a product of competition with subsidized operators.

With respect to container operations, the unsubsidized operators have carried an increasingly larger share of military cargo, have held their own in the bidding positions, and have received far greater profits from the military cargo movement than the subsidized lines. If anything, the competition between the two container fleets has been healthy and vigorous.

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[40]The record indicates that by January 1, 1973, there may be only 40 unsubsidized breakbulk ships in the U.S.-flag fleet and that by January 1, 1975, that number may dwindle to 25 ships.

Even if the record did support the existence of an undue competitive advantage for subsidized operators, however, the Board would not necessarily be required to modify the ODS program or any ODS contract to eliminate the advantage. On the contrary, § 605(c) of the Act provides:

> ". . . no contract shall be made with respect to a vessel operated or to be operated in an essential service served by two or more citizens of the United States with vessels of United States registry, if the Secretary of Commerce shall determine the effect of such a contract would be to give *undue advantage or be unduly prejudicial,* as between citizens of the United States . . . *unless, following public hearing . . . the Secretary . . . shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry.*" (Emphasis added)

Thus; where the Secretary (acting through the Board) finds, first, that U.S.-flag service in an essential service for which subsidy is requested is inadequate and, secondly, that the applicant has complied with the rule established in this proceeding – findings which, for all practical purposes, must be made before any ODS contract can be made – the issue of whether there is or is not an undue competitive advantage becomes irrelevant.

For the reasons recited in this section, AMA's unfair competition arguments are rejected.

B. Abatement of CDS for Carriage of Preference Cargo

The second primary issue in this proceeding is whether a vessel built with construction-differential

subsidy (CDS) may engage in carriage of preference cargo without abatement of subsidy. The CDS program is administered by the Board in accordance with the provisions of Title V of the Act.[41] AMA takes the position that one basic purpose of Title V is to promote construction of U.S.-flag vessels which will be able to and will in fact compete with foreign-flag vessels. Accordingly, AMA argues that the operator of a vessel built with CDS *on which ODS is being paid* must rebate CDS whenever that vessel fails to "meet foreign-flag competition" (or, by AMA standards, whenever preference cargo is carried). AMA proposes Rule 3B to implement its position.

AIMS opposes AMA's arguments on the grounds that Title V contains no operating restrictions relating in any way to foreign-flag competition and that there is no justification whatsoever in Title V for distinguishing, as AMA does, between vessels receiving and those not receiving ODS.

The Board has already considered and decided some aspects of the AMA position in a related proceeding – Docket S-244, Sub. 1.[42] In that proceeding, the Board ruled that no provision of the 1936 Act prohibits two and three year military charters of vessels built with CDS.[43] The Board now extends its conclusions and

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[41]46 U.S.C. § § 1151 et. seq.

[42]Docket S-244, Sub. 1, was commenced by Board Order dated April 3, 1970, and decided by Board Order dated October 13, 1970.

[43]The Board also ruled that "the military has statutory authority alternative to authority through the 1936 Act for such charters." The Board's decision has been upheld by the U.S. District Court for the District of Columbia. See *AMA v. Stans*, Civil Action No. 2090-70 (July 12, 1971). The District Court's unreported decision is presently on appeal by AMA to the U.S. Court of Appeals, District of Columbia Circuit.

finds that AMA's contentions – and AMA Rule 3B – have no merit whatsoever.

The purpose of the Title V CDS program is to provide subsidy to shipyards of the United States so that a ship purchaser may purchase a vessel in the United States for the same price he could have purchased an equivalent vessel abroad. The only significant restrictions applicable under Title V to vessels built with CDS are, first, that the vessel be registered under the U.S.-flag for its statutory economic life and, secondly, that the vessel engage in the foreign commerce of the United States (except as provided in §506 of the Act). Nowhere in Title V is there any mention of a requirement that a vessel built with CDS must "meet foreign-flag competition." Indeed, the only mention of foreign-flag competition ever appearing in Title V was removed by amendment in 1952.[44] Furthermore, the concept of attaching trading restrictions of any sort to vessels built with CDS – other than the restrictions requiring operation in the U.S. foreign commerce – was considered and rejected when the Merchant Marine Act of 1970 was passed.[45]

Title V also contains no provision requiring a distinction between vessels built with CDS receiving and those not receiving ODS. In other words, the fact that operation of a vessel built with CDS is subsidized under Title VI has absolutely no significance under Title V.

For these reasons, AMA's contention that a vessel built with CDS and subsidized under Title VI must either "meet foreign-flag competition" or rebate CDS is

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[44]See Act July 17, 1952, § 1, 2.

[45]See, e.g., H.R. Rep. No. 91-1073, 91st Cong., 2d Sess. 30 (1970).

rejected. So long as the vessel engages in the foreign commerce of the United States when required, the type and competitive attributes of the cargo carried are not matters for consideration under Title V.

C. Proof of Preference Cargo Carriage in §605(c) Hearings

AMA raises a third issue of subsidary significance in its petition, namely, whether the Board must receive evidence regarding carriage of preference cargo in hearings under §605(c) of the Act.[46]

Section 605(c) sets forth various standards governing grant of ODS applications. Among other things, these standards require that the Board determine, first, adequacy of existing U.S.-flag service in the essential service proposed to be subsidized and, secondly, consistency of a specific contract award with the purposes and policy of the Act. The third issue raised by AMA goes to the evidence which the Board must consider in order to make these determinations.

It is AMA's position that the degree to which an applicant-operator proposes to carry preference cargo is relevant to both the "purposes and policy" and the "adequacy of service" determinations and therefore evidence on that point must be received by the Board. AMA offers Rule 2 in support of its position.

In section A of this opinion – and in Board Rule 1 (see Appendix C) – the Board states the principle that:

> "No ODS contract will be awarded unless the applicant can establish that vessel operations

[46] 46 U.S.C. 1175(c).

> proposed to be subsidized will be conducted in a manner which will not preclude the applicant from earning at least 50% of its gross freight revenues for each service covered by the application from carriage of commercial cargoes, conference-rated civilian preference cargoes or open-rated civilian preference cargoes carried at 'world' rates."

This principle is intended to reflect the competitive requirements of §601. However, the applicant's satisfaction of this standard may, in some cases, be a proper subject for consideration under the "purposes and policy" standard of §605(c). To the extent that compliance with this principle is at issue in §605(c) hearing, the Board will receive evidence bearing on such compliance. Such evidence may, of course, include proof of the extent to which the applicant-operator may reasonably be expected to carry preference cargo.

It may also be the case that the mix of cargo proposed to be carried by an applicant will have some bearing on the "adequacy" issue in a §605(c) hearing. In that case, evidence with regard to applicant's cargo mix, including proposed carriage of preference cargo, will be received by the Board.

Subject to these general statements, however, the Board deems it best to leave the question of what evidence is appropriate to a given case in the hands of the examiner conducting the §605(c) hearing in that case. For this reason, the Board does not consider it appropriate to recommend adoption of any rule on the subject and does not recommend adoption of AMA Rule 2.

CONCLUSION

For the reasons stated in this opinion, the Board proposes the adoption of Board Rule 1 (see Appendix C) as an accurate statement of the competitive requirements of Title VI of the Act as they relate to carriage of preference cargoes.

The Board also proposes that regulations be published under §901(b)(2) of the Act establishing guideline rates for subsidized carriage of open-rated civilian preference cargo. The purpose of those guideline regulations will be to eliminate carriage of such cargo at premium rates and thus eliminate payment of a "double subsidy" to the subsidized operators engaged in such carriage.

The proposal of AMA that the Board Adopt AMA Rules 1, 2, 3A and 3B is rejected.

All motions of the parties not otherwise expressly granted or denied in this opinion are hereby denied.

All principles, rules and conclusions of law enunciated in this opinion shall have prospective application only and nothing stated herein should be construed as rendering illegal any prior acts, policies, rulings or interpretations of the Secretary, the Board or the Maritime Administration (and predecessor bodies) under the ODS and CDS programs. See *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947); *N.L.R.B. v. Beech-Nut Life Savers Inc.*, 274 F. Supp. 423 (S.D.N.Y. 1967), *aff'd.* F.2d 253 (2d Cir. 1968), *cert. denied* 394 U.S. 1012

(1968); *N.L.R.B. v. Q-T Shoe Manufacturing Co.*, 409 F.2d 1247 (3d Cir. 1969).

/s/Aaron Silverman
Aaron Silverman
Assistant Secretary

SO ORDERED
MARITIME SUBSIDY BOARD/
MARITIME ADMINISTRATION

Date: June 1, 1972

APPENDIX A

Text of Proposed AMA Rules

AMA Rule 1

The Secretary of Commerce interprets the statute as forbidding and he will in no case award operating-differential subsidy contracts in the absence of substantial foreign competition for the cargo applicant carries or will carry. Services devoted primarily to preference cargo are specifically included within this rule and will not qualify for subsidy.

AMA Rule 2

Hearings under section 605(c) of the Merchant Marine Act, 1936, will receive proof of the scope and impact

of all classes of cargo, including military cargo, in the carriage of which American vessels are by law entitled to preference. Such proof will include the extent to which applicants for subsidy or for expansion of subsidy carried and may reasonably be expected to carry such preference cargo.

AMA Rule 3A

No operating-differential subsidy shall be paid to carriers holding contracts under the Merchant Marine Act, 1936, except with respect to commercial carryings. If the subsidized vessel earns any gross revenue from other than commercial carryings the subsidy payment for the entire voyage shall be reduced by an amount that bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. For the purposes of this computation, gross revenue shall be calculated net of cargo loading and discharging cost. As used herein "commercial carryings" means carryings of private commercial cargo or passengers in foreign-flag competition. The determinations of the Secretary hereunder shall be final.

AMA Rule 3B

If a vessel for which construction-differential subsidy has been paid is subject to an operating-differential subsidy contract, and such vessel carries cargoes other than commercial cargoes on *liner* terms, the owner shall

pay annually to the Secretary that proportion of one twenty-fifth of such construction subsidy plus interest thereon at 6% per annum (computed on a level basis over 25 years) which the gross revenue derived from such cargoes bears to the gross revenue derived from the entire voyages of such vessel during such year, or if such vessel shall carry such cargoes on charter terms, the owner shall pay to the Secretary an amount which bears the same proportion to the construction subsidy plus interest thereon at 6% per annum (computed on a level basis over 25 years) as the duration of such charter bears to such period of 25 years. Gross revenue shall be calculated net of cargo loading and discharging cost.

APPENDIX B

Points Designated for Evidentiary Hearing By Board Order of December 1, 1969*

"1. The method or methods utilized by the Government and shippers for selection of the carriers of Government-sponsored or Government-impelled cargoes, which includes military cargoes (hereinafter 'preference cargoes').

2. Circumstances under which foreign-flag lines may (and the extent to which they do) carry preference cargoes.

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*Points 10 and 11 were added by Board Order of July 9, 1970.

3. The manner, if any, in which a subsidized operator's ability to penetrate into and carry the pool of commercial cargo is adversely affected by the carriage of preference cargoes.

4. The extent of available useful free space aboard vessels which are carrying preference cargoes.

5. The ratio of movement of commercial cargoes to preference cargoes by both subsidized and non-subsidized operators on a voyage basis.

6. Identification of all commercial cargoes regarding which there is an absence of substantial foreign-flag competition.

7. The financial impact on both subsidized and non-subsidized American-flag operators resulting from the carriage of preference cargoes.

8. Identification of companies operating U.S.-flag and foreign-flag vessels on the same route and the extent to which they participate in the movement (and the ships on which moved) of commercial cargoes and preference cargoes.

9. Any other facts germane to the issues presented by the AMA petition."

10. Information relevant to the preference cargo carriage by unsubsidized operators pursuant to special contracts, tramping and ship charters.

11. Cost as well as revenue information relating to the financial impact upon both subsidized and unsubsidized American-flag operators resulting from the carriage of preference cargo.

APPENDIX C

BOARD RULE 1

A. The purpose of this rule is to prescribe regulations governing award of ODS contracts and payment of subsidy under Title VI of the Merchant Marine Act, 1936, as amended (Act), as that Title has been interpreted by the Maritime Subsidy Board (Board) in Docket S-244.

B. For purposes of this rule:

(1) "Commercial cargoes," "conference-rated civilian preference cargoes," and "open-rated civilian preference cargoes carried at 'world' rates" shall be as defined by the Board in its final opinion in Docket S-244.

(2) "Gross freight revenues" shall mean gross revenues earned from the carriage of cargo. Gross revenues earned from the carriage of passengers and mail and miscellaneous gross revenues shall not be included within the term "gross freight revenues."

(3) "Inbound gross freight revenue" shall mean gross freight revenues earned from carriage of cargoes in foreign commerce inbound to the United States; "outbound gross freight revenue" shall mean gross freight revenue earned from carriage of cargoes in foreign commerce outbound from the United States.

Gross freight revenue earned from the carriage of wayport cargoes between foreign ports shall not be included within either outbound or inbound gross freight revenues.

(4) "Total gross revenue" shall mean gross freight revenues, gross revenues earned from carriage of passengers and mail and miscellaneous gross revenues.

(5) "Service" shall mean "essential service in the foreign commerce of the United States" as described in §211(a) or §211(b) of the Act. Where an ODS contract has been made, the specific nature of each service covered by the ODS contract shall be as defined in the contract.

C. No operating-differential subsidy (ODS) contract shall be made under Title VI of the Merchant Marine Act, 1936, as amended (Act), unless the applicant establishes in its application that the vessel operations proposed to be subsidized will be conducted in a manner which will not preclude the applicant from earning annually at least 50% of its inbound gross freight revenues and at least 50% of its outbound gross freight revenues for each service covered by the application from the carriage of commercial cargoes, conference-rated civilian preference cargoes or open-rated civilian preference cargoes carried at "world" rates.

D. (1) (a) ODS will be paid in full for vessel operations on the inbound leg of each service covered by an ODS contract only if at least 50% of the annual inbound gross freight revenues earned for that service are earned from the carriage of commercial cargoes, conference-rated civilian preference cargoes or open–rated civilian preference cargoes carried at "world" rates.

(b) If less than 50% of the annual inbound gross freight revenues earned on the inbound leg of a service covered by an ODS contract are earned from carriage of commercial cargoes, conference-rated civilian preference cargoes or open-rated civilian preference cargoes carried at "world" rates, payment of ODS for the inbound leg of the service shall be reduced as follows:

% of inbound gross freight revenue from carriage of competitive cargoes	ODS reduction (expressed in % of total ODS payable for cargo carriage on the inbound leg of the service)
40 - 49.9	20
30 - 39.9	40
20 - 29.9	60
10 - 19.9	80
0 - 9.9	100

(2) (a) ODS will be paid in full for vessel operations on the outbound leg of each service covered by an ODS contract only if at least 50% of the annual outbound gross freight revenues earned for that service are earned from the carriage of commercial cargoes, conference-rated civilian preference cargoes or open-rated civilian preference cargoes carried at "world" rates.

(b) If less than 50% of the annual outbound gross freight revenues earned on the outbound leg of a service covered by an ODS contract are earned from carriage of commercial cargoes, conference-rated civilian preference cargoes or open-rated civilian preference cargoes carried

at "world" rates, payment of ODS for the outbound leg of the service shall be reduced as follows:

% of outbound gross freight revenue from carriage of competitive cargoes	ODS reduction (expressed in % of total ODS payable for cargo carriage on the outbound leg of the service)
40 - 49.9	20
30 - 39.9	40
20 - 29.9	60
10 - 19.9	80
0 - 9.9	100

(3) The Board shall have the power to waive the provisions of sections D(1) and D(2) above for a specific period of time under special circumstances and for good cause shown.

E. (1) For purposes of section D(1)(b) above, "total ODS payable for cargo carriage on the inbound leg of a service" shall be computed in accordance with the following formula: inbound gross freight revenues for the service divided by total gross revenues for tne service times total ODS payable for the service equals total ODS payable for cargo carriage on the inbound leg of the service.

(2) For purposes of section D(2)(b) above, "total ODS payable for cargo carriage on the outbound leg of a service" shall be computed in accordance with the following formula: outbound gross freight revenues for the service divided by total gross revenues for the service times total ODS payable for the service equals total ODS payable for cargo carriage on the outbound leg of the service.

F. Nothing in this rule shall require the Board to examine into the cargo carried on any leg or legs of a single voyage and nothing in the rule shall prevent payment of ODS or require a reduction in ODS where a leg or legs of a single voyage is devoted exclusively to carriage of cargoes other than commercial, conference-rated civilian preference or open-rated civilian preference at "world" rates, provided only that the requirements of this rule are met.

G. This rule shall be effective 90 days after final publication in the *Federal Register*. The rule shall apply prospectively to all ODS contracts existing on the effective date of the rule and to all new ODS contracts made after such effective date.

H. *Example*:

Company A operates several vessels engaged in carrying (a) cargo, passengers and mail from the West Coast of the United States outbound to foreign ports in the Far East, (b) cargo between foreign ports in the Far East, and (c) cargo from foreign ports in the Far East inbound to the West Coast of the United States. Company A's operation on this service is subsidized under a valid ODS contract, made in accordance with section A of this rule. Total annual subsidy payable for Company A's service is $1,000,000.

In 1971, Company A's gross revenues were as follows:

Outbound Gross Freight Revenues	$ 4,000,000
Inbound Gross Freight Revenues	4,000,000
Gross Freight Revenues – Wayport Cargo	1,000,000
Total Gross Freight Revenues	$ 9,000,000
Passenger, Mail & Miscellaneous Gross Revenues	1,000,000
Total Gross Revenues	$ 10,000,000

Of the $4,000,000 outbound gross freight revenues, $1,600,000 or 40% was earned from carriage of commercial cargoes, conference-rated civilian preference cargoes and open-rated civilian preference cargoes carried at "world" rates. Of the $4,000,000 inbound gross freight revenues, $2,400,000 or 60% was earned from carriage of such cargoes.

Company A's failure to earn at least 50% of its outbound gross freight revenues from carriage of competitive cargoes disqualifies it from receiving full ODS for cargo carriage on the outbound leg of its service. Since the percentage of outbound gross freight revenue earned from carriage of competitive cargoes was only 40%, section D(2)(b) above requires that payment of ODS to Company A be reduced by an amount equal to 20% of total ODS payable for cargo carriage on the outbound leg.

Under section E(2) above, total ODS payable to Company A for cargo carriage on the outbound leg equals outbound gross freight revenues ($4,000,000) divided by total gross revenues ($10,000,000) times total ODS payable for the service ($1,000,000), or $400,000. 20% of $400,000 equals $80,000. Accordingly, subsidy payable to Company A in 1971 must be reduced $80,000 to $920,000.

MERCHANT MARINE ACT, 1936

(Revised through the 92d Congress)

[49 Stat. 1985, approved June 29, 1936]

AN ACT

To further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense, to repeal certain former legislation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—DECLARATION OF POLICY

SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

46 U.S.C. 1101
49 Stat. 1985.
84 Stat. 1018.
P.L. 91-469.

[§501(a)]

before 1952

SEC. 501.[23] (a) Any citizen of the United States may make application to the Commission for a construction-differential subsidy to aid in the construction of a new vessel, to be used on a service, route, or line in the foreign commerce of the United States, determined to be essential under section 211 of this Act. No such application shall be approved by the Commission unless it determines that (1) the service, route, or line requires a new vessel of modern and economical design to meet foreign-flag competition and to promote the foreign commerce of the United States; (2) the plans and specifications call for a new vessel which will meet the needs of the service, route, or line, and the requirements of commerce; (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable it to operate and maintain the proposed new vessel in such service, or on such route or line, and to maintain and continue adequate service on said route or line, including replacement of worn out or obsolete tonnage with new and modern ships; and (4) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of this Act.

[§501(a)]

after 1952

SEC. 501. (a) Any citizen of the United States may make application to the Commission for a construction-differential subsidy to aid in the construction of a new vessel to be used in the foreign commerce of the United States. No such application shall be approved by the Commission unless it determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable it to operate and maintain the proposed new vessel, and (3) the granting of the aid applied for is reasonably calculated to replace worn-out or obsolete tonnage with new and modern ships, or otherwise to carry out effectively the purposes and policy of this Act. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price shall not restrict the lawful or proper use or operation of the vessel except to the extent expressly required by law.

TITLE V—CONSTRUCTION-DIFFERENTIAL SUBSIDY [10]

SEC. 501. (a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel to be used in the foreign commerce of the United States. No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) if the applicant is the proposed ship purchaser, the applicant possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the proposed new vessel, and (3) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of this Act. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price shall not restrict the lawful or proper use or operation of the vessel except to the extent expressly required by law. The Secretary of Commerce may give preferred consideration to applications that will tend to reduce construction-differential subsidies and that propose the construction of ships of high transport capability and productivity.

46 U.S.C. 1151.
49 Stat. 1995.
52 Stat. 955.
66 Stat. 760.
84 Stat. 1019.
P.L. 91-469.
84 Stat. 1075.
P.L. 91-603.
Applicants to be U.S. citizens.
Requirements for approval of application.

[10] See footnote 19, p 59, infra.

[§ 502] (b) The amount of the reduction in selling price which is herein termed "construction differential subsidy" shall equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel (excluding the cost of any features incorporated in the vessel for national defense uses, which shall be paid by the Secretary in addition to the subsidy), over the fair and reasonable estimate of cost, as determined by the Secretary, of the construction of that type vessel if it were constructed under similar plans and specifications (excluding national defense features as above provided) in a foreign shipbuilding center which is deemed by the Secretary to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed. The Secretary of Commerce shall recompute such estimated foreign cost annually unless, in the opinion of the Secretary, there has been a significant change in shipbuilding market conditions. The Secretary shall publish notice of his intention to compute or recompute such estimated foreign cost and shall give interested persons, including but not limited to shipyards and shipowners and associations thereof, an opportunity to file written statements. The Secretary's consideration shall include, but not be limited to, all relevant matter so filed, and his determination shall include or be accompanied by a concise explanation of the basis of his determination. The construction differential approved and paid by the Secretary shall not exceed 55 per centum of the construction cost of the vessel, except that in the case of reconstruction or reconditioning of a passenger vessel having the tonnage, speed, passenger accommodations and other characteristics set forth in section 503 of this Act, the construction differential approved and paid shall not exceed 60 per centum of the reconstruction or reconditioning cost (excluding the cost of national defense features as above

Construction differential subsidy.

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[§502(b)]

provided): *Provided, however*, That after June 30, 1970, the construction differential approved by the Secretary shall not exceed in the case of the construction, reconstruction or reconditioning of any vessel, 50 per centum of such cost. When the Secretary finds that the construction differential exceeds the following percentages: in fiscal year 1971, 45 per centum; in fiscal year 1972, 43 per centum; in fiscal year 1973, 41 per centum; in fiscal year 1974, 39 per centum; in fiscal year 1975, 37 per centum; in fiscal year 1976 and thereafter, 35 per centum, the Secretary may negotiate with any bidder, whether or not such bidder is the lowest bidder, and contract with such bidder, notwithstanding the provisions of the first sentence of section 505 with respect to competitive bidding, to construct, reconstruct, or recondition such vessel in a domestic shipyard at a cost which will reduce the construction differential to such applicable percentage, or as close thereto as possible, or less.

* * *

46 U.S.C. 1156.
49 Stat. 1999.
52 Stat. 958.
73 Stat. 12.
74 Stat. 216.

Subsidized vessels to be operated in foreign trade, round voyages intercoastal ports, island possessions.

SEC. 506.[14] Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

Temporary transfer of vessel to domestic trade.

No operating subsidy during transfer.

[14] See section 9(d) of the Merchant Ship Sales Act of 1946, as amended. See also footnote 5, p. 25, supra.

[§601(a)]

TITLE VI—OPERATING-DIFFERENTIAL SUBSIDY[19]

46 U.S.C. 1171.
49 Stat. 2001.
75 Stat. 90.
84 Stat. 1023.
P.L. 91-469.
84 Stat. 1675.
P.L. 91-603.

Applicants to be U.S. citizens.

SEC. 601. (a) The Secretary of Commerce is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States or in such service and in cruises authorized under section 613 of this title. In this title VI the term "essential service" means the operation of a vessel on a service, route, or line described in section 211(a) or in bulk cargo carrying service described in section 211(b). No such application shall be approved by the Secretary of Commerce unless he determines that (1) the operation of such vessel or vessels in an essential service is required to meet foreign-flag competition and to promote the foreign commerce of the United States except to the extent such vessels are to be operated on cruises authorized under section 613 of this title, and that such vessel or vessels were built in the United States, or have been documented under the laws of the United States not later than Feb-

Requirements—approval of application.

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[19] Section 10 of the Merchant Marine Act of 1970 (Public Law 91-469; 84 Stat. 1036), provides:

"(a) The amendments made by this Act shall not affect any contract with the Secretary of Commerce or his delegates that is in effect on the date of enactment of this Act. At the request of the other party to such operating-differential subsidy contract, the Secretary of Commerce shall amend such contract so as to be in accordance with all of the amendments made by this Act. No amendment made by this Act shall be incorporated in such contract unless all such amendments are incorporated in such contract, except that if the other party elects to continue under the "old fund" as provided in section 607 as amended by section 21 of this Act, such amendment need not be incorporated in such contract. Until such contract is amended or if such contract is not amended, it shall be administered in accordance with the provisions of the Merchant Marine Act, 1936, as they existed immediately prior to enactment of this Act. Nothing in section 16 of this Act amending section 603 of the Merchant Marine Act, 1936 or in the contracts made thereunder, shall be deemed to affect or to change existing law or contracts with respect to the proceedings now pending before the Secretary of Commerce relating to the payment of subsidy in respect of cargoes covered by section 901(b)(1) of the Merchant Marine Act, 1936, section 616(a) of title 15, United States Code, or section 2631 of title 10, United States Code.

(b) If any operating-differential subsidy contract in existence on the date of enactment of this Act is amended by including all of the amendments made by this Act or all of the amendments made by this Act other than those made by section 21, the operator may elect to terminate his recapture period as of the date of such contract amendment and have his recapture computed on the basis of the shortened period, or he may elect to continue his recapture period until the end of its ten-year term and continue his recapture obligations as provided by the Merchant Marine Act, 1936, prior to the enactment of this Act until the end of such ten-year period. The amendments in either event shall provide that, with respect to seafaring personnel, in determining the rights and obligations of the contractor under such contract, the limitation of section 805(c) of the Merchant Marine Act, 1936, as it existed immediately before the enactment of this Act shall not apply."

[§601(a)]

ruary 1, 1928, or actually ordered and under construction for the account of citizens of the United States prior to such date; (2) the applicant owns or leases, or can and will build or purchase or lease, a vessel or vessels of the size, type, speed, and number, and with the proper equipment required to enable him to operate in an essential service in such manner as may be necessary to meet competitive conditions, and to promote foreign commerce; (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations of the vessel or vessels as to meet competitive conditions and promote foreign commerce; (4) the granting of the aid applied for is necessary to place the proposed operations of the vessel or vessels on a parity with those of foreign competitors, and is reasonably calculated to carry out effectively the purposes and policy of this Act. To the extent the application covers cruises, as authorized under section 613 of this title, the Board may make the portion of this last determination relating to parity on the basis that any foreign flag cruise from the United States competes with any American flag cruise from the United States.

[§602)

SEC. 602. Except with respect to cruises authorized under section 613 of this title, no contract for an operating-differential subsidy shall be made by the Secretary of Commerce for the operation of a vessel or vessels to meet foreign competition, except direct foreign-flag competition, until and unless the Secretary of Commerce, after a full and complete investigation and hearing, shall determine that an operating-differential subsidy is necessary to meet competition of foreign-flag ships.

46 U.S.C. 1172.
49 Stat. 2002.
52 Stat. 964.
53 Stat. 1182.
75 Stat. 91.
84 Stat. 1035.
P.L. 91-469.

[§603(a)]

[§603(b)]

SEC. 603. (a) If the Secretary of Commerce approves the application, he may enter into a contract with the applicant for the payment of an operating-differential subsidy determined in accordance with the provisions of subsection (b) of this section, for the operation of such vessel or vessels in an essential service and in cruises authorized under section 613 of this title for a period not exceeding twenty years, and subject to such reasonable terms and conditions, consistent with this Act, as the Secretary of Commerce shall require to effectuate the purposes and policy of this Act, including a performance bond with approved sureties, if such bond is required by the Secretary of Commerce.

46 U.S.C. 1173.
49 Stat. 2002.
53 Stat. 1185.
75 Stat. 91.
75 Stat. 513.
84 Stat. 1024.
P.L. 91-469.
Contract with applicant for payment—operation not to exceed 20 years—bond.

(b) Such contract shall provide, except as the parties should agree upon a lesser amount, that the amount of the operating-differential subsidy for the operation of vessels in an essential service shall equal the excess of the subsidizable wage costs of the United States officers and crews, the fair and reasonable cost of insurance, subsistence of officers and crews on passenger vessels, as defined in section 613 of this Act, maintenance, and repairs not compensated by insurance incurred in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 501(b)) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract: *Provided*, *however*, That the Secretary of Commerce may, with respect to any vessel in an essential bulk cargo carrying service as described in section 211(b), pay, in lieu of the operating-differential subsidy provided by this subsection (b), such sums as he shall determine to be necessary to make the cost of operating such vessel competitive with the cost of operating similar vessels under the registry of a foreign country. For any period during which a vessel cruises as authorized by section 613 of this Act, operating-differential subsidy shall be computed as though the vessel were operating on the essential service to which the vessel is assigned: *Provided*, *however*, That if the cruise vessel calls at a port

Operating Differential Subsidy.

[§603(b)]

or ports outside of its assigned service, but which is served with passenger vessels (as defined in section 613 of this Act) by another subsidized operator at an operating-differential subsidy rate for wages lower than the cruise vessel has on its assigned essential service, the operating-differential subsidy rates for each of the subsidizable items for each day (a fraction of a day to count as a day) that the vessel stops at such port shall be at the respective rates applicable to the subsidized operator regularly serving the area.

[§605(a)]

SEC. 605. (a) No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however*, That such subsidy may be paid on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. No vessel operating on the inland waterways of the United States shall be considered for the purposes of this Act to be operating in foreign trade.

46 U.S.C. 1175.
49 Stat. 2003.
66 Stat. 764, 765.
73 Stat. 12.
74 Stat. 216.
84 Stat. 1026.
P.L. 91-469.
No subsidy for coastwise, intercoastal trade.
Exception--round voyages.
Reduction of subsidies.

* * *

[§605(c)]

* * *

(c) No contract shall be made under this title with respect to a vessel to be operated in an essential service, served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Commerce shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or to be operated in an essential service served by two or more citizens of the United States with vessels of United States registry, if the Secretary of Commerce shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in such essential service, unless following public hearing, due notice of which shall be given to each operator serving such essential service, the Secretary of Commerce shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Secretary of Commerce, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as he may deem proper.

Additional service no subsidy for.

Exception—inadequacy of existing service.

No subsidy giving undue advantage between competitive services.

Exception—notice, hearing. Considerations, determination of competitive services.

[§802]

SEC. 802. Every contract executed by the Commission under authority of title V of this Act shall provide that—

46 U.S.C. 1212.
49 Stat. 2011.
52 Stat. 962.
53 Stat. 1254.

Payment by U.S. acquisition, construction subsidized vessels—computation of value.

In the event the United States shall, through purchase or requisition, acquire ownership of the vessel or vessels on which a construction-differential subsidy was paid, the owner shall be paid therefor the value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national-defense features) less the depreciated amount of construction-differential subsidy theretofore paid incident to the construction or reconditioning of such vessel or vessels, or the fair and reasonable scrap value of such vessel as determined by the Commission, whichever is the greater. Such determination shall be final. In computing the depreciated value of such vessel, depreciation shall be computed on each vessel on the schedule adopted by the Bureau of Internal Revenue for income-tax purposes.

The foregoing provision respecting the requisition or the acquisition of ownership by the United States shall run with the title to such vessel or vessels and be binding on all owners thereof.

TITLE IX—MISCELLANEOUS PROVISIONS

SEC. 901.[28]

* * *

U.S. merchant vessels. Cargo preference.

(b)(1)[29] Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographical areas: *Provided*, That the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of section 901(b)(1) and so notifies the appropriate agency or agencies: *And provided further*, That the provisions of this subsection shall not apply to cargoes carried in the vessels of the Panama Canal Company. Nothing herein shall repeal or otherwise modify the provisions of Public Resolution Numbered 17,

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[28] See suspensions in annual appropriation Acts for the Commission during World War II and post-war, and also exemptions in other appropriation Acts, such as the Department of State Appropriation Act, 1950 (Public Law 179, 81st Cong., title I, sec. 103; 63 Stat. 456) and the Department of State Appropriation Act, 1951 (Public Law 759, 81st Cong., chap. III, title I, sec. 103; 64 Stat. 615).

See also Public Law 86-607, sec. 3, 46 U.S.C. 817b, re U.S. employees receiving reduced rates on U.S. vessels and amendment by Public Law 87-877, sec. 3, 46 U.S.C. 817c, similar provisions re foreign vessels.

[29] With regard to supplies for the Army, Navy, and Air Force (100-percent carriage) see 10 U.S.C. 2631.

[§901(b)(1)]

Seventy-third Congress (48 Stat. 500), as amended.[30] For purposes of this section, the term "privately owned United States-flag commercial vessels" shall not be deemed to include any vessel which, subsequent to the date of enactment of this amendment, shall have been either (a) built outside the United States, (b) rebuilt outside the United States, or (c) documented under any foreign registry, until such vessel shall have been documented under the laws of the United States for a period of three years: *Provided, however*, That the provisions of this amendment shall not apply where, (1) prior to the enactment of this amendment, the owner of a vessel, or contractor for the purchase of a vessel, originally constructed in the United States and rebuilt abroad or contracted to be rebuilt abroad, has notified the Maritime Administration in writing of its intent to document such vessel under United States registry, and such vessel is so documented on its first arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment, or (2) where prior to the enactment of this amendment, the owner of a vessel under United States registry has made a contract for the rebuilding abroad of such vessel and has notified the Maritime Administration of such contract, and such rebuilding is completed and such vessel is thereafter documented under United States registry on its first arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment.

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[30] Section 3 of Public Law 962, 84th Cong. (amending the Agricultural Trade Development and Assistance Act of 1954, as amended (68 Stat. 458)) reads as follows:

"SEC. 3. Sales of fresh fruit and the products thereof under title I of the Act shall be exempt from the requirements of the cargo preference laws (Public Resolution 17, Seventy-third Congress (15 U.S.C. 616a) and section 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. 1241(b)))."

For transportation in United States vessels under the provisions of the Mutual Security Act of 1954, see section 509 thereof (68 Stat. 853) and the amendment to such section made by Public Law 138, 84th Cong. (69 Stat. 288), Public Law 726, 84th Cong. (70 Stat. 560), Public Law 85-141 (71 Stat. 363), and Public Law 85-477 (72 Stat. 269). See also Public Law 86-472 (74 Stat. 134), secs. 204(e) and 401(d), relating to Indus Basin Development.

46 U.S.C. 1242.
49 Stat. 2015.
53 Stat. 1255.
57 Stat. 49.
70 Stat. 985.
Requisition of vessels, national emergency—value and compensation.

SEC. 902.[31] (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

Restoration of vessel.

No consequential damages.

Value of vessel—relation of construction differential: national defense features.

(b) When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as

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[31] For the purposes of section 902(a), World War II and the national emergencies of September 8, 1939, and May 27, 1941 were terminated by the Act of July 25, 1947 (Public Law 239, 80th Cong.; 61 Stat. 449).

The President, on December 16, 1950, issued a Proclamation of National Emergency (15 F.R. 9029).

See under heading "Maritime Activities", provisions creating a Vessels Operations Revolving Fund and prescribing limitations on computation of payments for requisition, purchase, or loss of vessels in Public Law 45, 82d Cong. (65 Stat. 59), 46 U.S.C. 1241a. See also in this connection, Public Law 455, 82d Cong. (66 Stat. 413), Public Law 195, 83d Cong. (67 Stat. 381), Public Law 471, 83d Cong. (68 Stat. 427), Public Law 121, 84th Cong. (69 Stat. 231), Public Law 604, 84th Cong. (70 Stat. 319), Public Law 85-52 (71 Stat. 70), and Public Law 85-469 (72 Stat. 226). See also Public Law 85-721 (72 Stat. 710).

See the provision of the Supplemental Independent Offices Appropriation Act, 1949, approved June 30, 1948 (Public Law 862, 80th Cong.; 62 Stat. 1196), which reads as follows: "Whenever, in connection with any transaction involving the sale, purchase, or requisition of any vessel, the United States shall be or become obligated to pay any sum to the other party to the transaction and said other party shall be or is indebted to the United States on account of any transaction involving the sale, purchase, or requisition of any vessel the amount so owing to the United States shall be deducted from the amount due the other party, and hereafter no officer or employee of the Government shall pay to such other party a sum greater than the net amount owing the other party." See similar (temporary) provision in the Independent Offices Appropriation Act, 1948, approved July 30, 1947 (Public Law 269, 80th Cong.; 61 Stat. 585 at 604).

For authority to arm American vessels in time of war or national emergency, see the Act of June 29, 1948 (Public Law 817, 80th Cong.; 62 Stat. 1095).

For emergency authority to acquire foreign merchant vessels, see Public Law 569, 83d Congress, approved August 9, 1954 (68 Stat. 675), infra.

[§ 902]

provided in section 802 of this Act, and in determining the value of any vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded.

[§905(a)]

46 U.S.C. 1244.
49 Stat. 2016.
52 Stat. 964.
66 Stat. 765.
73 Stat. 597.
84 Stat. 1034.
P.L. 91-469.
Definitions.
Foreign commerce, foreign trade.

SEC. 905. When used in this Act—

(a) The words "foreign commerce" or "foreign trade" mean commerce or trade between the United States, its Territories or possessions, or the District of Columbia, and a foreign country, except that in the context of section 607 of this Act concerning capital construction funds and in the context of title V of this Act concerning construction-differential subsidy, the said words "foreign commerce" or "foreign trade" shall also include, in the case of liquid and dry bulk cargo carrying services, trading between foreign ports in accordance with normal commercial bulk shipping practices in such manner as will permit U.S.-flag bulk vessels freely to compete with foreign-flag bulk carrying vessels in their operation or in competing for charters, subject to rules and regulations promulgated by the Secretary of Commerce pursuant to section 204(b) of this Act.

Person.

TITLE 10 U.S.C. §2631

§ 2631. [Military] Supplies: preference to United States vessels

Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons. Aug. 10, 1956, c. 1041, 70A Stat. 146.

* * *

TITLE 15 U.S.C. §616a

§ 616a. Shipment of exports financed by Government in United States vessels

It is the sense of Congress that in any loans made by the Reconstruction Finance Corporation or any other instrumentality of the Government to foster the exporting of agricultural or other products, provision shall be made that such products shall be carried exclusively in vessels of the United States, unless, as to any or all of such products, the United States Maritime Commission, after investigation, shall certify to the Reconstruction Finance Corporation or any other instrumentality of the Government that vessels of the United States are not available in sufficient numbers, or in sufficient tonnage capacity, or on necessary sailing schedule, or at reasonable rates. Mar. 26, 1934, c. 90, 48 Stat. 500; June 29, 1936, c. 858, Title II, § 204, 49 Stat. 1987.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-800

AMERICAN MARITIME ASSOCIATION,
Petitioner

v.

PETER G. PETERSON, ET AL.
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION
for
AMERICAN INSTITUTE OF MERCHANT SHIPPING, LINER COUNCIL, INTERVENOR

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January 2, 1976

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-800

AMERICAN MARITIME ASSOCIATION,
Petitioner

v.

PETER G. PETERSON, ET AL.
Respondents

BRIEF IN OPPOSITION FOR INTERVENOR, AMERICAN INSTITUTE OF MERCHANT SHIPPING, LINER COUNCIL

OPINIONS BELOW
JURISDICTION

The presentation in the petition under these heads is satisfactory.

QUESTIONS PRESENTED

As we read the petition, it presents three questions:

1. Whether 46 C.F.R. Part 280 is invalid insofar as it—

(a) reduces the operating-differential subsidy paid a subsidized service under the Merchant Marine Act,

1936, only if half or more of the annual freight revenue on the outward or inward leg is derived from "preference cargo," reserved in whole or in part for carriage by U.S.-flag vessels; and

(b) excludes "conference-rated civilian preference cargo" from the category of "preference cargo" which is measured for purposes of that subsidy reduction.

2. Whether the Merchant Marine Act, 1936, requires the subsidized ship operator to repay construction-differential subsidy in proportion to the freight revenues derived from the carriage of preference cargo.

STATUTES INVOLVED

There are directly involved (a) Sections 101, 501, 601, 603 and 901(b) of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. §§ 1101, 1151, 1171, 1173 and 1241, and (b) the Act of April 28, 1904, 33 Stat. 518, 10 U.S.C. § 2631, and Pub. Res. 17, 73d Cong., 48 Stat. 500, 15 U.S.C. § 616a. These are reprinted at pp. A-81-98 of the Appendix to the petition.

RESTATEMENT OF THE CASE

The petitioner's statement of the case, including the evidentiary material in the first two pages of its argument, is quite remarkable in that it offers not a single record reference to support its statement of facts, and its rendition of source materials in our view sometimes bears only the faintest resemblance to the original source. We believe these distortions are unimportant to the grant or denial of the petition, and content ourselves with some precautionary corrections in the margins of our Argument, and with the following restatement of the case.

1. *The 1936 Act.* The Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. §§ 1101 et seq., authorizes the award of subsidy in two areas: Title V authorizes payment of construction-differential subsidy to shipyards, and Title VI authorizes payment of operating-differential subsidy to ship operators, in each case in an amount designed to off-set the lower costs of foreign competitors.

2. *The Preference Cargoes.* The Act of April 28, 1904, 10 U.S.C. § 2631, requires that all military cargo be shipped on U.S.-flag vessels; Public Resolution 17 of March 26, 1934, 15 U.S.C. § 616a, requires that except as waived by the Maritime Administration all cargo resulting from U.S. Government loans be shipped on U.S.-flag vessels. At least nine post-war relief statutes required that at least 50% of the cargo shipments be on U.S.-flag vessels.[1] The cargo preferences established individually by those statutes were consolidated and codified in 1954 as § 901(b) of the Merchant Marine Act.

The preference cargoes fall into three principal categories when classified according to their shipping characteristics:[2] (a) Military cargo, reserved entirely for U.S.-flag vessels, has since 1966 been allocated among the lines on the basis of semi-annual competitive bids [A-46-48]. (b) Civilian preference cargo, usually in packaged form and flowing out of the ordinary commercial world, moves under conference rates uniform for preference and commercial cargoes, and for U.S.- and for-

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[1] Economic Cooperation Act, 62 Stat. 143; Amendments to E.C.A., 63 Stat. 50; Mutual Defense Assistance Act of 1949, 63 Stat. 714; Yugoslav Emergency Relief Assistance Act of 1950, 64 Stat. 1122; India Emergency Food Aid Act of 1951, 65 Stat. 69; Wheat for Pakistan Act of 1953, 67 Stat. 80; Famine Relief Act of 1953, 67 Stat. 476; Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454; Mutual Security Act of 1954, 68 Stat. 832.

[2] We pass over a fourth and less prevalent category recognized by the agency: open-rated preference cargo which moves at world rates [A-52-53].

eign-flag carriers [A-48-51]. (c) Civilian preference cargo moving usually in bulk at "open rates" is individually bid by the carrier without conference control. Most of the carriage is by tramp vessels in full load lots but some moves in smaller parcels aboard liners. As only U.S.-flag vessels can bid for the 50% which is preference, the rates are typically more than the foreign-flag bids on the other 50% [A-51-52].

The comparative carriage of these three types of preference cargo and of commercial cargo in 1969, the latest year of record, was [Ex. AIMS-87, 91; R. 4813, 4820]:

	Subsidized		Unsubsidized	
	000 L/T	%	000 L/T	%
Outbound				
Commercial	2843	46	58	3
Preference General	1543	25	572	28
Preference Bulk	333	5	468	22
Military	1449	23	979	47
Inbound				
Commercial	3504	98	68	—
Preference General	19	—	26	—
Preference Bulk	—	—	—	—
Military	68	2	—	—
Round Voyage				
Commercial	6347	65	126	6
Preference General	1562	16	597	28
Preference Bulk	333	3	468	22
Military	1517	16	979	45

3. *The Agency Proceedings.* American Maritime Association ("AMA") on July 1, 1969, petitioned the Secretary of Commerce to issue rules which would require the repayment of operating subsidy in exact proportion to the carriers' revenues from all types of preference cargo. The American Institute of Merchant Shipping,

Liner Council ("AIMS") answered. The matter was in the end delegated to the Maritime Subsidy Board which directed an evidentiary fact-finding hearing [A-6-7].

Before the agency, and subsequently before the courts, AMA and AIMS have taken diametrically opposed positions. AMA urged that, as the Merchant Marine Act conditions subsidy upon a determination that the subsidized vessels will meet foreign competition, so no subsidy can be paid in respect of any cargo which is not subject to foreign-flag competition. AIMS urged that if the vessels and the services were competitive, there was no requirement that particular lots of cargo be subject to foreign-flag competition.

The Chief Examiner concluded AMA was right as to military and open-rated civilian preference cargo, but not as to conference-rated civilian preference cargo [A-7]. The Maritime Subsidy Board on exceptions held [A-42]:

> * * * the Board finds that it can accept neither the AIMS nor the AMA interpretation of § 601. The Board specifically rejects AMA's contention that subsidized vessel operations must be devoted almost exclusively to carriage of cargo subject to foreign-flag competition in order to qualify for an ODS contract. The Board also rejects AMA's contention that ODS may be paid under a valid contract only for carriage of cargo subject to foreign-flag competition. We think the statute and its legislative history clearly establish that the purpose of the ODS program is not to subsidize cargo carriage but instead to subsidize operation of vessels so that the vessels are in a position to carry cargo on a competitive basis. On the other hand, we do not accept the AIMS position that the actual performance of a vessel operator as a competitor can be ignored.

> Rather, it is our judgment that payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience.

This principle led the Board to conclude that subsidy should be reduced, on a sliding scale, to the extent that more than 50% of the annual freight revenue, on either the outward or the inward legs of the voyage, derived from military or open-rated civilian preference cargo. [A-43-36, 48, 52] Regulations to accomplish this were proposed [A-75-80] and subsequently adopted [46 C.F.R. § 380.1-10].

4. *The Court Proceedings.* AMA filed a complaint in the District Court to set aside the Board decision. AIMS, because the practical injury to its members was not large, did not file suit, but instead intervened as a defendant along with the Government officials. It advanced, however, its full argument as a reason for dismissing the AMA complaint. District Judge Aubrey Robinson accepted the AIMS reasoning and dismissed the complaint [A-29-33].

Both AMA and the Government defendants appealed. The Court of Appeals accepted the Government reasoning and remanded to the District Court for modification of its order of dismissal [A-1-28].

ARGUMENT

A. No Ground for Certiorari is Shown

1. Petitioner does not claim that there is any conflict of lower court decision. There is, instead, a striking unanimity of decision. Three court of appeals decisions, three district court decisions, and three agency decisions have each rejected, without a dissenting vote, petitioner's contentions. Operating subsidy: *Opinion of*

Controller General, Op. B-159245, SRR 10,264 (1966); *Fact-Finding Hearing—Payment of Subsidy for Carriage of Preference Cargoes*, 13 S.R.R. 44 (MSB, 1972; A 34-80); *Columbia SS Corp.* v. *American Mail Line*, Civ. No. 71-132 (D. Ore., unreported opinion of Chief Judge Solomon, Sept. 6, 1972; *Columbia SS Corp.* v. *American Mail Line*, 510 F. 2d 29 (CA9, 1975); *American Maritime Association* v. *Peterson*, Civ. No. 1576-72 (D. D.C., unreported opinion of Judge Aubrey Robinson, Feb. 7, 1974; A-29-33); *States Marine International* v. *Peterson*, 518 F. 2d 1070 (CADC, 1975 A-1-28). Construction subsidy: *Charters to MSC of CDS-Built Vessels*, 11 S.R.R. 1037 (MSB, 1970); *Fact-Finding Hearing—Payment of Subsidy for Carriage of Preference Cargoes, supra*, A-65-68; *American Maritime Association* v. *Stans*, 329 F. Supp. 1179 (D. D.C., 1971); *American Maritime Association* v. *Stans*, 485 F.2d 765 (CADC, 1973); *States Marine International* v. *Peterson, supra*, A-26-28.

2. Petitioner advances no claim that the decision below is in conflict with any decision of this Court, nor that any major question of general law, whether of substance or of procedure, has erroneously been decided.

3. Petitioner's sole claim for the attention of this Court is the ringing statement that "upon the correct construction of the act hinges the economic fate of the major unsubsidized sector of the American Merchant Marine, which has represented the surge capacity of the nation in war or in emergency * * *." [Pet. 9]. Even if this were a ground for certiorari, the claim is false.

(a) Petitioner speaks here for the unsubsidized breakbulk liners and dry-cargo bulk ships.[1] They have

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[1] Sea-Land Service, Inc. is a major, unsubsidized operator of containerships and is the largest and most profitable liner company under the U.S.-flag if not in the world. While it is a member of

virtually disappeared, but not because subsidized liners have carried preference cargoes [cf. Pet. 10]. They have virtually disappeared because without significant exception the vessels were all built during World War II.[2] Not even the mandate of this Court could keep the ordinary steamship afloat into its fourth decade of ocean service.

(b) The few dry-cargo ships without long-term subsidy contracts which remain operating in the foreign trades under the U.S.-flag, along with a good many tankers, are now chiefly engaged in the carriage of grain to Russia.[3] They are subsidized, on a short-term basis, under the same provisions of the 1936 Act which govern long-term subsidy contracts [33 Fed. Reg. 22747, 24349]. The grain which they carry is reserved to U.S.-flag vessels by executive agreement.[4] If AMA were to succeed in convincing this Court that subsidy should be disallowed to the extent that non-competitive cargo is carried, most of the aged residue of its unsubsidized breakbulk and dry bulk fleet would promptly be put out of business.

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petitioner association (and apparently accounts for nearly half of the vessels claimed by petitioner at Pet. 10), there has never been any claim that Sea-Land's welfare is in any way affected by this proceeding.

[2] Exs. AIMS-17, 18. The Board's explicit finding that the shrinkage of the unsubsidized breakbulk fleet "seems more a product of age and condition of vessels and decreased volume of breakbulk military cargo than a product of competition with subsidized operators" [A-64] has never been directly challenged by petitioner.

[3] Maritime Administration, U. S. Dept. of Commerce, 1974 Annual Report, pp. 87-88 lists 87 vessels subsidized for this trade, of which 32 were owned by petitioner's members (24 tankers and 8 of the 16 dry cargo vessels owned by petitioner's members).

[4] Compilation of Presidential Documents, 1972, p. 1142, Arts. 7, 8 and Annex III.

B. The Merits

We undertake here a supererogatory showing, in the fewest possible words, that the three agency and six court decisions (*supra*, pp. 6-7) have correctly rejected petitioner's argument. That argument [Pet. 11-12] reconstructs the 1936 Act in order to produce an artificial symmetry. First, §§ 601-603 are read to require that subsidy be denied in respect of any cargo not gained in head-to-head competition with foreign-flag lines. Next, § 901(b) is recast, in flat contradiction of its words[5] and administration, so that its rate ceiling becomes a guaranteed floor to ensure profitable carriage of preference cargo by unsubsidized vessels. This "natural, unforced meaning" of the statute thus creates two completely separate systems of support for the American Merchant Marine: direct subsidy for commercial cargo under Title VI of the Act and indirect subsidy under § 901(b) through higher rates on preference cargo. However tidy the dichotomy envisioned by AMA, it has no relation to the statute actually enacted and actually administered. Specifically:

1. *The 1936 Act.* (a) The statute in six passages in §§ 601-603 defines the necessity that subsidy be designed to meet foreign-flag competition. In every instance it speaks of "vessels" or "service, route or line," and never of particular cargoes.

(b) The principal cargo preference statutes—for military and Government-financed cargoes—antedated the 1936 Act. That Act itself established three types of U.S.-flag preference. §§ 212(d), 405, 901(a). Yet there is not a word in the statute or its history to suggest that the vessels subsidized by the 1936 Act could not carry

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[5] "* * * at least 50 per centum of the gross tonnage * * * shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, * * *." [A-94].

these cargoes, or would be subject to subsidy abatement if they were carried.

2. *The Cargo Preference Legislation.* (c) Throughout the 1948-1954 period of individually enacted preference provisions in connection with foreign relief legislation (*supra*, p. 3) the Congress explicitly recognized that the subsidized lines would share in the carriage of the preference cargo. As the House Merchant Marine & Fisheries Committee concluded after 1955 oversight hearings: [6]

> "* * * if a vessel sails with empty or half empty holds under circumstances where his foreign competitor would lose money, the American owner likewise loses notwithstanding the subsidy paid on his operating expenses. He must have cargo, in other words."

3. *The Long Administrative Construction.* (a) the Board from 1936 to the present day has never refused or reduced a subsidy voucher because of the carriage of preference cargo, and in at least 21 formal proceedings, reaching from 1949 to 1974, has recognized that subsidized lines were carrying military or civilian preference cargo. For one of many examples, in *American President Lines, Ltd.*, 65 SRR 1031, 1041 (1966), the Board noted that "the needs of moving defense cargo are considered when determining how much vessel capacity is needed for the trade * * *."

(b) The Comptroller General in Op. B-159245, SRR 10,264 (1966) followed much the line of reasoning indicated above and concluded—

> "* * * this legislative background and the long-established administrative practice must be considered as establishing that operating-differential subsidy is payable, without reduction, even though a part of

[6] H. Rep. No. 1818, 84th Cong., 1st Sess., p. 2.

the cargo carried on particular voyage is military cargo which is reserved for U.S.-flag vessels."

4. *Conference-Rated Civilian Preference Cargo.* The largest volume of preference cargo carried by the subsidized lines is that of general, packaged cargo which because of Government financing (or more rarely ownership) is governed by the 50 per cent preference requirement of § 901(b). This cargo originates in and moves through the ordinary commercial channels, and is "generally indistinguishable by physical characteristics" [A-50]. The freight rate is that fixed by the steamship conference for ordinary commercial cargo [id.]. Even petitioner's ally, States Marine International, in the agency and district court proceedings, agreed that *this* preference cargo moved at the same world rates as commercial cargo and should not be subject to subsidy abatement [Tr. 1972].

Petitioner makes an extraordinary argument to support its contrary claim. Since, it says, a rate conference is a cartel and is designed to eliminate rate competition, the conference-rated preference cargo cannot be viewed as gained in competition with foreign-flag lines, and subsidy may not be paid in respect of its carriage [Pet. 16-18]. The contention if accepted would amount to a repeal of the Merchant Marine Act, 1936, since virtually all cargo carried by liners is booked at conference rates.[7]

5. *The "50% Rule".* The Board, recognizing that the Act did not require that subsidy be denied in respect of every parcel of preference cargo, nevertheless held that it could not ignore "the actual performance of a vessel operator as a competitor," and that "payment of subsidy for operation of vessels must be governed by

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[7] Even in 1969, at the height of the Vietnam need for military cargo, 81 per cent of the carriage of the subsidized liners was general cargo subject to conference rates (*supra*, p. 4).

the degree to which that competitiveness is reflected in actual operating experience" [A-42]. It accordingly held that a "substantial portion" of the carrier's freight revenues must derive from carriage subject to foreign-flag competition or rate influence, and interpreted "substantial portion" to mean 50% [A-43]. Its regulations accordingly abate subsidy, on a sliding scale, to the extent that more than half the annual freight revenue on either the outward or inward leg of the voyage derives from military cargo or open-rated civilian preference cargo.

Petitioner complains that the selection of 50 per cent was unexplained [Pet. 14]. No explicit explanation was needed for adoption of this self-evident and necessarily rough measure of substantiality. It is the same as the 50% rule of thumb ordinarily applied by the Board to define the statutory objective carriage of "a substantial portion of the * * * foreign commerce of the United States." [8]

Petitioner complains, too, that despite high carriage of preference cargo in 1969 the Board's rules would not in actual operation penalize the subsidized carriers [Pet. 10-13]. To dramatize its complaint petitioner makes repeated use of high percentages which: (a) are without a single exception completely undocumented by record reference [Pet. 3, 5, 12, 13, 16]; (b) invariably include *sub silentio* civilian conference-rated cargo on the tacit assumption that petitioner was right and all others wrong; [9] (c) frequently attribute outbound carriage per-

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[8] Sec. 101 of Merchant Marine Act, 1936. See, e.g., *Bloomfield SS Corp.*, 4 F.M.B. 305, 317 (1953); *American President Lines, Ltd.*, 5 F.M.B. 359, 370 (1957); *Atlantic Express Lines of America, Ltd.*, 2 S.R.R. 725, 732 (1963).

[9] Thus petitioner places repeated emphasis on Lykes' Gulf/Far East outbound carriage in 1969 of 95% preference cargo [Pet. 3, 5, 12]. Without treating civilian general cargo as preference, that long ton percentage drops to 29% outbound and 22% round voyage

centages to the entire round voyage [Pet. 3, 5, 12]; and (d) are frequently incorrect even within these eccentric boundaries.[10]

6. *Construction Subsidy.* Petitioner, notwithstanding five adverse decisions (*supra*, p. 7) persists in its argument that construction subsidy should be refunded by the operator in proportion to the carriage of preference cargo. It seems sufficient to dispose of this contention to point out that: (a) The construction subsidy is paid the shipyard, not the ship operator [A-27, A-67].[11] (b) The requirement in §§ 601-603 that operating subsidy be paid vessels meeting foreign competition, the necessary foundation from which petitioner extrapolates its argument that this means each lot of cargo must be gained in foreign-flag competition, was in 1952 eliminated from § 501, governing construction subsidy [A-26-27, A-67]. The Board was in our view restrained in its conclusion that petitioner's "contentions * * * have no merit whatsoever" [A-67].

[Ex. AIMS-87], while the four other services given at Pet. 12 would drop on their outbound legs from 80% to 47%, from 86% to 31%, from 82 % to 33%, and from 76% to 42% [*id.*]

[10] We assert, without troubling this Court with proof, that petitioner exaggerates by 11% in claiming "over 70%" preference cafriage on the major routes in the years of record [Pet. 5] and by 50% in its extra-record and undocumented statement as to military container carriage to the Far East in 1970-1973 [Pet. 13].

[11] The plausibility of the petition is not advanced by its argument that this is not so since the operator not the shipyard was required to file application for the subsidy prior to 1970 and usually does so after the 1970 Act [Pet. 26-28]. From 1936 onward, § 502(a) provided for "payment * * * to the shipbuilder" when the Government built the ships and resold to the applicant and § 504 made the Government a party to the shipyard contract, required to pay the subsidy, when the operator itself contracts for the ships. The 1970 Act made explicit the implicit requirement in § 504 that the construction subsidy be paid "to the shipyard." And one can think of no issue more conclusively settled by agency finding than the Board's statement that it paid the subsidy to the shipyard [A-67].

CONCLUSION

The petition borders on the frivolous, and should be denied. If it be denied, then so, too, should our own cross-petition in No. 75-798 be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

January 2, 1976

I hereby certify that in compliance with Rule 33 of this Court I have this day served three copies of the foregoing brief in opposition by first class mail, postage prepaid, upon Joseph A. Klausner, Esq., 1028 Connecticut Avenue, N.W., Washington, D.C. 20036 and upon the Solicitor General, Department of Justice, Washington, D.C. 20530.

WARNER W. GARDNER

Supreme Court, U. S.
FILED
JAN 27 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-798 and 75-800

In the Supreme Court of the United States

OCTOBER TERM, 1975

AMERICAN INSTITUTE OF MERCHANT SHIPPING, LINER COUNCIL, PETITIONER

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

AMERICAN MARITIME ASSOCIATION, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF COMMERCE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-798

AMERICAN INSTITUTE OF MERCHANT SHIPPING, LINER COUNCIL, PETITIONER

v.

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No. 75-800

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-28)[1] is reported at 518 F.2d 1070. The opinion of the district court (Pet. App. A-29 to A-33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1975. The petitions for a writ of certiorari

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[1]"Pet. App." refers to the separately bound appendix in No. 75-800.

were filed on December 4, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Maritime Subsidy Board was authorized to issue a regulation that would reduce operating-differential subsidies for merchant marine lines, to the extent certain cargo reserved by statute for carriage by U.S. flag vessels produced more than half of their earnings.

2. Whether the Merchant Marine Act requires the rebate of construction-differential subsidies for American-built vessels that operate in foreign commerce but do not encounter substantial foreign-flag competition.

STATUTES INVOLVED

The relevant statutes are reprinted at Pet. App. A-81 to A-98.

STATEMENT

1. The American Maritime Association ("AMA"), petitioner in No. 75-800, is an organization of unsubsidized American shipping companies. In July 1969 it requested the Secretary of Commerce to issue rules under the Merchant Marine Act of 1936, 49 Stat. 1985 *et seq.*, as amended (the "Act"), 46 U.S.C. 1101 *et seq.*, that would forbid the payment (or the award of a contract requiring the payment) of an operating-differential subsidy to any shipping company that carried "preference" cargo. Preference cargo is cargo reserved by law for shipment in U.S. flag vessels, including all military cargo, all cargo the purchase of which is financed by the Export-Import Bank, and 50 percent of certain other cargo (Pet. App. A-2, A-6).[2]

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[2]See 10 U.S.C. 2631 (military cargo); 15 U.S.C. 616a (cargo purchased with government loans); Sections 901(b), 46 U.S.C. 1241(b) (government-owned or financed cargoes).

Operating-differential subsidy contracts may be awarded under Section 601(a) of the Act, 46 U.S.C. 1171(a), only if the operation of a vessel in a particular route, line, or service "is required to meet foreign-flag competition." An operating-differential subsidy is payable under Section 603(b) of the Act, 46 U.S.C. 1173(b), only to make up the differential of certain operational costs between U.S. flag vessels and vessels of foreign-flag "substantial competitors." AMA argued that, to the extent a U.S. flag vessel carries preference cargo, its operation does not meet foreign-flag competition, since foreign-flag vessels cannot compete for or carry that cargo. Therefore, it continued, no subsidy whatever should be provided to the extent any line carries preference cargo. AMA also requested the Secretary to issue a rule requiring subsidized shipping lines to rebate the construction-differential subsidy they may have received under Section 501(a) of the Act, 46 U.S.C. 1151(a), to the extent any vessels built with the subsidy (and operated by lines receiving operating-differential subsidy) are used to carry preference cargo rather than to meet foreign-flag competition.[3]

The Maritime Subsidy Board, the Secretary's delegate, commenced rulemaking proceedings. The American Institute of Merchant Shipping, Liner Council ("AIMS"), petitioner in No. 75-798, an organization of subsidized American shipping companies, participated in the rulemaking and opposed the issuance of any rules that would require the reduction or rebate of subsidies.

2. In June 1972 the Maritime Subsidy Board announced a decision that satisfied neither petitioner.

a. With respect to AMA's contention that a vessel carrying preference cargo should not receive an operating-differential subsidy, the Board held that Section 601(a)

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[3]The rules proposed by AMA are set out at Pet. App. A-71 to A-73.

of the Act, 46 U.S.C. 1171(a), which states that a subsidy will be provided only if "required to meet foreign-flag competition," allows a subsidy to be furnished when a carrier meets "substantial" foreign-flag competition. Competition is "substantial," the Board held, if less than 50 percent of a carrier's revenue is derived from preference cargo that moves at rates insulated from foreign competition (Pet. App. A-43).[4] Determining that payment of the subsidy should not depend upon the simple absolutes postulated by either AMA or AIMS, the Board wrote (Pet. App. A-42):

> We think the statute and its legislative history clearly establish that the purpose of the [operating-differential subsidy] program is not to subsidize cargo carriage but instead to subsidize operation of vessels so that the vessels are in a position to carry cargo on a competitive basis. On the other hand, we do not accept the AIMS position that the actual performance of a vessel operator as a competitor can be ignored. Rather, it is our judgment that payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience.

Regulations implementing the Board's decision were adopted in October 1972. 46 C.F.R. Part 280. The regulations provide for the reduction of operating-differential subsidy on a sliding scale where less than 50 percent of gross annual freight revenues from a particular route, line, or service (computed separately for outbound and inbound voyages) are derived from cargoes subject to foreign-

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[4]The Board's decision applies only to general cargo operations in regular liner services, not to bulk carrying services. See Pet. App. A-37, n. 9; 46 C.F.R. 280.2(e); Section 211(a), 46 U.S.C. 1121(a). Bulk carriers did not become eligible for the operating-differential subsidy until 1970. See 46 U.S.C. 1121(b) and 1171(a).

flag competition.[5] 46 C.F.R. 280.4(a)(2).

b. The Board rejected AMA's claim concerning construction-differential subsidy for American-built vessels that carry preference cargo in foreign commerce. The Board pointed out that since 1952 there has been no requirement in the Act that such vessels "meet foreign-flag competition" (Pet. App. A-67). So long as a vessel engages in "foreign commerce," the Board held, it meets the requirements of Section 501(a) of the Act for a construction-differential subsidy (Pet. App. A-67 to A-68).

3. In the district court AMA urged that the Board's regulations did not go far enough in requiring reduction or rebate of the subsidies. AIMS intervened, claiming (as it does here) that the Board had no power to reduce the operating-differential subsidy. The district court granted summary judgment in favor of AIMS (Pet. App. A-29 to A-33).

AMA and the Secretary appealed. The court of appeals reversed; it upheld the Board's decision in full (Pet. App. A-1 to A-28), rejecting the arguments of both AMA and AIMS. The court of appeals wrote (Pet. App. A-24 to A-25):

> The Act consistently speaks of awarding [operating] subsidies only to vessels "meeting foreign competition". The legislative history, however, indicates that Congress had contemplated the payment of some "double subsidies" to shippers carrying preference cargo. Whether or not this is "unfair competition", as AMA contends, it was foreseen by Congress. The Board's rule reducing subsidy when a vessel is not in

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[5]Some preference cargo is deemed to be "subject to foreign-flag competition" because it is carried at "conference rates" or at competitive "world rates." See Pet. App. A-45. All non-preference cargo is deemed to be "subject to foreign-flag competition."

"substantial competition" appears to strike a sound balance between the intention of Congress and the competitive needs of the industry.

ARGUMENT

The Board and the court of appeals have dealt exhaustively with the issues raised by petitioners, and their decisions are correct. As the court of appeals concluded, the order of the Board "is a reasonable and proper determination of a difficult and complex situation, both factually and legally" (Pet. App. A-28). The decisions of the Board and the court of appeals achieve the objectives of the Merchant Marine Act. The contrary and opposed positions of the unsubsidized and subsidized companies would not further these objectives; each segment of the industry is seeking a competitive advantage at the expense of the other and of the national interest. There is no conflict among the circuits or with any decision of this Court, and no further review is warranted.

1. Petitioner AMA argues that "[u]pon the correct construction of the act hinges the economic fate of the major unsubsidized sector of the American merchant marine, which has represented the surge capacity of the nation at war or in emergency * * *" (Pet. 9). AMA contends that the demise in the last several years of the unsubsidized breakbulk fleet of the United States has been caused by the ability of subsidized carriers to underbid its members for the preference cargo upon which they depend.

That is not the case. The Board explained (Pet. App. A-64; footnote omitted):

> It is true, of course, that the unsubsidized breakbulk fleet is rapidly being scrapped or sold foreign. This status, however, seems more a product of age and condition of vessels and decreased volume of breakbulk military cargo than a product of competition with subsidized operators.

Unsubsidized operators are able to compete effectively with subsidized carriers because the law imposes substantial economic disadvantages on the latter. First, subsidized carriers are limited to regularly-scheduled services over a fixed route, while the unsubsidized lines are not. 46 U.S.C. 1121(a) and 1171(a). The operations of the unsubsidized lines therefore are more flexible and less costly. Second, the subsidized lines lose their subsidy to the extent that they engage in domestic trade. Sections 605(a) and 805(a), 46 U.S.C. 1175(a) and 1223(a). Third, the subsidized lines cannot have foreign affiliations. Section 804, 46 U.S.C. 1222. Fourth, subsidized lines must use American-built ships. 46 U.S.C. 1171(a). In light of these restrictions it should come as no surprise that one of the largest, fastest-growing and most profitable lines receives no operating-differential subsidy.[6]

2. The cargo preference laws have been instrumental in maintaining the vitality of American shipping. They represent a form of subsidy to all American lines, to the extent they enable those lines to carry more revenue-earning cargo than they otherwise would. They operate to prevent American ships from sailing "with empty or half empty holds." H.R. Rep. No. 1818, 84th Cong., 2d Sess. 2 (1956). Operating-differential subsidy makes up the difference between the cost of operating an American ship and the cost of operating a foreign ship. But the subsidized carrier, like any other carrier, must attract cargo or lose money.

The cargo preference laws were not designed to aid just the unsubsidized segment of the American merchant

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[6]Sea-Land Services, Inc. (a member of AMA), pioneered containerized cargo operations. An economic consultant for Sea-Land noted that the restrictions upon the operation of a subsidized carrier would "seriously reduce Sea-Land's flexibility of operations which have contributed significantly to profitability in the past" (AIMS Exh. 252, p. 2).

marine. But neither were they designed to permit the subsidized lines to avoid their statutory obligation to "meet foreign-flag competition" by concentrating upon the carriage of non-competitive preference cargo. The Board's decision recognizes both these points and harmonizes the operating subsidy program with the cargo preference laws by requiring a reduction of operating-differential subsidy if the subsidized line does not "substantially" meet foreign-flag competition. The Board's ruling is amply supported by the statutory language and legislative history, as the opinion of the court of appeals demonstrates (Pet. App. A-11 to A-17, A-24 to A-25). The "50 percent" rule harmonizes the statutory policies by giving equal effect to the congressional requirement of competition and the congressional authorization to carry non-competitive preference cargoes[7]. Compare *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, with *Milk Transport, Inc.* v. *Interstate Commerce Commission*, 190 F.Supp. 350, 354-355 (D. Minn.), affirmed, 368 U.S. 5.[8]

3. AIMS argues that the Board is perpetually bound by what it contends[9] has been the Board's practice of not

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[7]AMA argues that the substantial competition rule cannot be reconciled with the Board's allegedly absolute rule against carriage of preference cargoes by bulk carriers, which became entitled to operating-differential subsidy by virtue of a 1970 amendment. See Pet. 15. There is no such general prohibition, however. AMA's quotation from the Federal Register was a description of the facts of a particular subsidy application.

[8]Cf. *Atlantic Express Lines of America--Subsidy Application*, 1 DOC 104, 110 (Section 101 of the Act, 46 U.S.C. 1101, establishing a goal of developing a merchant marine capable of carrying a "substantial portion" of the nation's foreign water-borne commerce, means that at least 50 percent of such commerce should be so carried).

[9]But see Pet. App. A-22.

reducing the operating-differrential subsidy on account of excessive carriage of preference cargo. But the Bord has done nothing more than to interpret, for the first time (Pet. App. A-38), the governing statutes. The court of appeals properly held that an agency "is free to act when conditions change and is not tied to past practices, as long as its decisions are fairly reasoned and considered" (Pet. App. A-23). This Court has articulated that principle many times. See, *e.g.*, *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 100-101; *National Labor Relations Board* v. *J. Weingarten, Inc.*, 420 U.S. 251, 264-267.[10]

4. AMA (Pet. 16-18) faults the Board's determination that "cargoes subject to foreign-flag competition," and therefore not subject to subsidy reduction, include conference-rated preference cargoes.

Much preference cargo is shipped at "conference" rates—rates identical to the rates that would be charged for its transportation in foreign bottoms.[11] The Board explained (Pet. App. A-50) that "[s]ince commercial [non-preference] cargo and preference cargo moving under the conference rate system are generally indistinguishable by physical characteristics, the competitive attributes of carrying conference-rated preference cargo are virtually

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[10]Congress acknowledged the instant proceedings and deferred to them. Section 40(a) of the 1970 Amendments, 84 Stat. 1037, provides that nothing in the amendments "shall be deemed to affect or to change existing law or contracts with respect to the proceedings now pending before the Secretary of Commerce relating to the payment of subsidy in respect of cargoes covered by" a preference.

[11]"Where conferences exist, the cargo rates are the same for vessels of all nations * * *." S. Rep. No. 91-1080, 91st Cong., 2d Sess. 10-11 (1970).

identical to those of carrying conference-rated commercial cargo." The Board therefore properly accorded conference-rated preference cargo a status equal to that of non-preference cargo for subsidy purposes.

5. AMA finally argues (Pet. 18-28) that construction-differential subsidies must be rebated to the extent that American-built vessels carry preference cargo, and also receive an operating-differential subsidy. Under AMA's argument its members, which receive no operating-differential subsidy, could retain their construction-differential subsidy no matter how much preference cargo their vessels transport. See AMA's proposed rule 3B, Pet. App. A-72 to A-73.

But the Act draws no distinctions based on this criterion. As its name implies, a construction-differential subsidy equalizes the costs of construction of a vessel, not the cost of its operation. Under the Act, a vessel is entitled to retain its construction-differential subsidy so long as it is engaged in "foreign commerce" of the United States. "Foreign commerce" is expressly defined in Section 905(a) of the Act, 46 U.S.C. 1244(a), as "commerce or trade between the United States * * * and a foreign country * * *." The definition does not require competition with foreign vessels. The omission is understandable, since the major purpose of the construction-differential subsidy is to enable American lines to purchase American-built vessels at a price competitive with what would be charged by foreign shipyards for foreign-built vessels. The type of cargo subsequently carried by the vessel is not material to this purpose.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1976.

DOJ-1976-01

Supreme Court, U.S.
FILED
FEB 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-800

AMERICAN MARITIME ASSOCIATION,
Petitioner,

v.

ELLIOT L. RICHARDSON, vice Peter G. Peterson, Secretary of Commerce, et al.,
Respondent.

REPLY OF PETITIONER TO BRIEF OF THE FEDERAL RESPONDENTS IN OPPOSITION

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February 5, 1976.

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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Petitioner's basis for seeking certiorari is the importance of the questions presented to national policy governing defense and commerce by sea. The large sector of the merchant marine that petitioner represents has been a major factor in defense, and the military authorities have perceived the disappearance of one of its major components as a significant loss and detriment.

The brief in opposition of the Solicitor General denies that the misinterpretation of law alleged by petitioner has been responsible for this loss and detriment, but also argues the correctness of the decision below. Petitioner replies as follows.

1. The Solicitor reduces the case to a controversy in which different sectors of the industry seek a competitive advantage "at the expense of the other and of the national interest." At 6. The destruction of the unsubsidized fleet has not been a service to the national interest, but on the contrary endangers it. See testimony of Department of Defense, cited petition p. 9 n. 1. Petitioner's members seek no competitive advantage, but that in common fairness government subsidy shall not be employed against them when it was intended by Congress for competition against foreign carriers.

2. But the Solicitor denies that non-compensatory bidding by subsidized lines has been the cause of this injury to the unsubsidized companies (breakbulk and container) and to the national interest, citing a single sentence from the agency decision. Id. Contradicting this cavalier disposition stand the detailed findings of the Board's Chief Examiner, the agency's own practically contemporaneous statement before the Federal Maritime Commission, and the decision below.

a. Since the Solicitor goes to the merits, the Chief Examiner's findings should be stated. He found that subsidized carriers were generally underbidding unsubsidized breakbulk carriers, although "non-subsidized containership operators were able to compete fairly well ratewise." JA [in the record below] 69. "In late 1969-70 the impact of competitive, below fully-allocated cost bidding for military cargo by subsidized carriers caused non-subsidized conventional liner carriers to suffer financial hardship resulting in (a) cancellation of orders for modern ships and (b) sales of vessels to foreign interests for operation or scrapping, thus diminishing U.S.-fla fleet capability of carrying military cargo in case of national emergency." JA 71. "The existing system of paying operating differential subsidy to some, but not all, U.S. carriers in support of

competitive bids for military cargo at non-compensatory rates . . . 3. Supports unfair and destructive competitive practices against non-subsidized conventional U.S.-flag carriers . . .; and 4. Results in decreasing overall U.S. military shipping capacity by forcing non-subsidized carriers to transfer vessels for operation under foreign-flag." JA 89. "Formerly States Marine and Lykes were competitive in the Gulf-Far East and Gulf-Mediterranean preference trades, but more recently States Marine has dropped out because of underbidding by Lykes. In the fertilizer movement in India . . . the existence of a bidding advantage derived from subsidy, favoring AEIL, was conceded by AIMS . . . In 1969, . . . AML and States [subsidized] carried all the preference wheat to Korea by underbidding States Marine's $25.00 per ton rate with an $18.25 - 18.50 rate supported by operating subsidy . . . On rice . . . Lykes used its operating subsidy to slightly underbid States Marine for the U.S.-flag portion of the Government-impelled cargo rather than compete with foreign-flag carriers for the non-preference (over 50%) share". JA 98. "The recent decline in the movement of preference cargoes, the improved efficiency of the non-subsidized containership carriers, and the continued subsidy supported underbidding has had a serious adverse impact on the non-subsidized conventional carriers" [listing transfers and scrappings of 45 vessels in 1970 and the first four months of 1971]. JA 110. "The suggestion that most of the 145 non-subsidized vessels will be obsolete in 3-5 years is questionable given more equitable competitive conditions." JA 116. "The payment of operating-differential subsidy based on higher U.S.-flag costs to some but not all U.S.-flag carriers . . . results in unfair competition destructive of an important segment of the U.S. Merchant Marine". JA 120.

b. The Board's disposition of its Chief Examiner's exhaustive findings is in a single sentence, unsupported by

constitutive findings, and was immediately contradicted by its own testimony before the Federal Maritime Commission, petition p. 10 n. 2.

c. The Court of Appeals accepted the Chief Examiner's findings. Petition app. A-6 n. 4.

d. The Solicitor suggests that unsubsidized carriers are able to "compete effectively" with subsidized carriers because of alleged inflexibilities imposed upon the latter. At 7. No factual foundation is adduced for this assertion, and it is contrary to the record. The remaining allegations are either equally applicable to unsubsidized companies or merely equalize the competition between them by deliberate congressional intention.

3. The Solicitor agrees that the subsidized lines have "a statutory obligation to 'meet foreign-flag competition' ", which they may not "avoid by concentrating upon the carriage of non-competitive preference cargo." At 8. However, he defends the Board's rule, under which, owing to its exemption first of 50% of gross revenue and then of a major category of cargo that foreigners may not lawfully carry, subsidized lines may "concentrate upon the carriage of non-competitive preference cargo" to the extent of 95% without remitting a penny of subsidy.

a. The Solicitor defends the 50%-rule as "harmonizing" the statutory policies by "giving equal effect to the congressional requirement of competition and the congressional authorization to carry non-competitive preference cargoes." At 8. Of course, the Board gave no reason whatever for this exemption, and the Solicitor (whose independent rationalization, it is unnecessary to say, enjoys no authority) has not improved the legal position. It is not apparent how carrying 50% preference cargo "harmonizes" with a statute that forbids the award of subsidy except to meet foreign competition. §601 (a), MMA'36, as

amended, 46 U.S.C. §1171. The factual and analytical justification for allowing a 50% deviation is as little explained by the Solicitor as by the Board.

b. The Solicitor defends the exemption of cargoes moving at conference freight rates merely by quoting the Board's own scant and conclusory words, devoid of factual underpinning. At 9. But the correctness of the Board's exclusion turns on whether the joint fixing of rates by the subsidized lines and foreign lines constitutes competition, considering that the foreign lines are forbidden physically to carry the cargo. Does rate-fixing constitute competition?

4. With respect to the ruling on construction-differential subsidy, the Solicitor advances a different justification from the Court below for omitting to recapture in proportion to the carriage of non-competitive cargo. Cf. §506, MMA '36, 46 U.S.C. §1156. He says that "the major purpose of the construction-differential subsidy is to enable American lines to purchase American-built vessels at a price competitive with what would be charged by foreign shipyards for foreign-built ships." At 10. But is this not to enable them to compete with foreign carriers in the carriage of cargo? If they do not compete, they have no need for the subsidy, and no one would dream of paying it to them. See petition p. 20-21. What they carry cannot, therefore, be irrelevant, as the Solicitor suggests.

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